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Strategies for the Justifications of Ḥudūd Allah and their Punishments in the
Islamic Tradition

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Abstract

The punishments of Islamic criminal law and in particular, the notoriously severe *ḥadd* punishments, were never systematically justified in classical Islamic jurisprudence (*fiqh*). However, the *fiqh* tradition is ripe with debates about *ḥadd* punishments, and theories of justification, while not fully spelt out, are often implied in the writings of Muslim jurists. In Part I of this thesis, three *fiqh* strategies for the justification of *ḥadd* punishments are described and critically evaluated: one that seeks to characterize the *ḥadd* punishments as divinely ordained, immutable “rights of God” (ch. 1), one that describes the purpose of *ḥadd* punishments as serving general as well as individual prevention (ch. 2), and one that stresses that to suffer *ḥadd* is an expiatory act that amends for sins and thus ensures salvation in the Hereafter (ch. 3). The Sunnī legal schools (*madhāhib*), salient representatives of which are studied in this dissertation, controversially discussed the meaning and purpose of *ḥadd* punishments in the context of each of these three *fiqh* discourses.

Part II of this thesis proceeds to describe and discuss contemporary Muslim debates about the applicability and justifiability of *ḥadd* punishments today. While only few Islamic regimes currently implement *ḥadd*, the topic has a large symbolical importance because it exemplifies the struggle of Muslim thinkers to reconcile Islam with modernity. In a first step, this thesis aims to clarify to what extent contemporary positions echo, attack or simply sidestep classical *fiqh* positions: how, in other words, the present is connected to the traditional *fiqh* framework of the past (ch. 4). In a concluding chapter, a number of salient topics of debate in the contemporary *ḥadd* controversy are analysed within the cultural and political contexts in which they are located (ch. 5).

While classical legal doctrines about *ḥadd* punishments, despite the controversies between the *madhāhib*, tend to be rigid, emphasizing the immutable character of the criminal law norms found in the Shari‘ah, the periodic calls among contemporary thinkers for the implementation of *ḥadd* are, it is suggested, largely driven by political agendas.

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As always, any errors and or inadequacies that may remain in this research, surely, the responsibility is entirely my own.

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0. Introduction

0.1 Scope of this research

This research investigates a specific area of Islamic criminal law, namely, the *ḥadd* laws and the punishments associated with them. Particular attention is paid to how the *ḥudūd* (pl. of *ḥadd*) are justified in the Islamic legal tradition, which is based on the Qurʾān, the Sunnah and on the rules derived from these two sources in Islamic jurisprudence (*fiqh*).¹ *Ḥadd* norms according to the Islamic tradition aim at regulating the power of Islamic governments to inflict punishments on individuals in order to enforce compliance with Islamic law (*Shariʿah*). According to the majority of Sunnī jurists, *ḥadd* punishments, which are defined as “fixed, mandatory punishments (*ʿuqūbāt muqaddara*) that are based on the Qurʾān and the Sunna”,² aim at protecting the interests of the general public and its core values, values that Islamic society regards as crucial for its stability, even if the immediate interest that is protected is a private one, for instance, in offences such as theft (*sariqa*) and slander (*qadhf*).

¹ In this research I have followed a narrow definition of *ḥadd* Allāh as defined in the Qurʾān and Sunnah: *ḥadd al-ridda* (apostasy), *ḥadd al-zinā* (illegal sexual intercourse), *ḥadd al-qadhf* (false accusation of committing illegal sexual intercourse), *ḥadd al-sariqa* (theft), *ḥadd al-ḥirāba* (banditry), *ḥadd shurb al-khamr* (consuming alcohol).

² Rudolph Peters, *Crime and Punishment in Islamic Law* (Cambridge: Cambridge University Press, 2005), p. 53.

The Islamic tradition of jurisprudence (*fiqh*) provides an insight into what Muslim society and in particular, the jurists of this society regard as its core values. In this thesis, I attempt to collect and systematize the strategies and arguments scattered over the Islamic legal literature (*uṣūl* and *furūʿ al-fiqh*) that jurists, both classical and modern, developed to justify *ḥadd* punishments. I critically analyse the rich and various opinions of Muslim jurists about the main justifications of *ḥadd* offences, that, is well known, are often severe, including both corporal (scourging, amputation and crucifixion) and capital penalties (stoning and beheading by sword). Furthermore, I compare and contrast the classical justifications of *ḥadd* punishments with the justifications and critiques voiced by modern and contemporary Muslim thinkers. I pay special attention to how they view the question of the current implementation of *ḥadd* punishment today. In particular, I aim to show to what extent modern debates about *ḥadd* punishments are indebted to the *fiqh* tradition and how it evaluates *ḥadd* punishments and their justifications offered for them in *fiqh* discourse.

One of the characteristics of Islamic criminal law is that it does not conform to the notion of law as found, for instance, in common law or civil law systems. Hence the problems of contemporary Muslim thinkers when dealing with *ḥadd*. The *ḥudūd* seem especially difficult to reconcile with modernity; they appear as the archaic remnants of a medieval, unenlightened and irrational period of human history. The *ḥudūd* thus represent one of the thorniest challenges to contemporary Islam.

It should be noted, however, that *ḥadd* law, though it may at seem a uniform and unequivocal set of legal formulations, is in reality the product of a juristic discourse that consists of a spectrum of often diverse and sometimes even contradictory opinions. Muslim jurists stipulate, on the basis of the Qurʾān, the Prophetic tradition (*ḥadīth*), scholarly consensus (*ijmāʿ*) and analogical extension of the law (*qiyās*), what the law should be and how it should be implemented. However, due to the fact that these jurists and scholars interpret the sources (Qurʾān and Sunnah) in many different ways, we find a great diversity of opinions in the various justifications of *ḥadd* punishments that are proffered in the jurisprudential tradition. Sunnī classical jurists were aware of this, and they developed numerous ways to make these legal differences manageable for those who had to apply the law, that is, for the most part, the Muslim judges.

However, before entering into the Muslim legal debates about how to interpret, develop, circumscribe and apply *ḥadd* norms, it is necessary to offer a basic outline of the law of *ḥadd*: its bases in the Qurʾān and the Sunnah, the crimes for which they are imposed, and the punishments which are commonly associated with them.³ By way of introduction, I shall also highlight some of the salient debates that have accompanied these basic coordinates of *ḥadd* law. Following this, I will discuss the aims and objectives that this thesis pursues, review the relevant secondary literature, and offer

³ Cf. Rudolph Peters, *Crime and Punishment in Islamic Law*, pp. 6-68

some reflections on the methodology embraced in this research, before concluding this introduction with an overview of the chapters in this thesis.

0.2 The doctrinal foundations of *ḥadd* offences and their punishments

In this section, I outline the basics of the legal concepts of *ḥadd Allāh*, that is, the offences (*jarā'im*) and their punishments (*uqūbāt*) of the law of *ḥadd*, as generally agreed upon in Sunnī jurisprudence (*fiqh*). There are six *ḥadd* offences that appear in the jurists' legal manuals: Apostasy (*ridda*), illegal sexual intercourse (*zinā*), false accusation of illegal sexual intercourse (*qadhf*), theft (*sariqa*), armed robbery (*ḥirāba*), and drinking alcohol (*shurb al-khamr*). These are widely regarded as the fixed and immutable *ḥadd* offences. Other offences are sometimes in the category as well, but will not receive further attention in this thesis⁴

0.2.1 Apostasy (*ridda*)

According to the majority of Sunnī jurists, apostasy is as the act of releasing oneself from the Islamic religion (*al-rujū' 'an al-dīn al-Islāmī*) by disbelieving in God's existence and the Day of Judgement. Apostasy can be realized by uttering or performing something heretical; upholding a theological doctrine which negates the existence of God; rejecting the

⁴ I exclude the offence of *baghy* as it is very much disputed as to whether it is in fact one of the *ḥadd* offences. For further reading about *baghy*, see Khaled Abou El-Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001).

prophecy of His prophets; mocking, cursing either God or His prophets; and kneeling down in prayer to idols; among other things.⁵ The legal definition of the apostate (*murtadd*) is that he or she is the one who turns away from Islam (*al-rujūʿ ʿan al-dīn al-Islāmī*) or serves the ties with Islam (*qaṭʿ al-Islām*). In the definition of *murtadd* jurists refer to someone who is Muslim either by birth (i.e., born into a Muslim family) or by conversion (*taḥawwul*), and who then renounces Islam, irrespective of whether or not s/he subsequently embraces another faith.⁶

The Qurʾānic prescriptions regarding those who commit apostasy differ significantly. What is important, particularly in light of the later Sunnī juristic development, is that although apostates are usually assigned a specific place in Hell, there is no explicit mention of any specific capital or corporal punishment to which apostates are to be subjected in this world. However, according to most classical jurists, apostasy is considered as one of the *ḥadd* offences punishable by capital punishment (usually by the sword). In support of their claim, classical jurists relied extensively on the following narration which is attributed to the Prophet Muḥammad and which figures in some of the most canonical collections of *ḥadīth*: “If someone changes his religion, then kill him.”⁷

⁵ Wael Hallaq, “Apostasy”, *Encyclopaedia of the Qurʾān*, vol. 1, p. 119.

⁶ Al-Ḥusayn al-Baghawī, *Al-Taḥdhīb fī fiqh al-Imām al-Shāfiʿī* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), vol. 7, p. 288; Muwaffaq al-Dīn Abū Muḥammad ʿAbdullah Ibn Qudāma, *Al-Mughnī* (Cairo: Hijr, 1990), vol. 12, p. 264.

⁷ Muḥammad Al-Bukhārī, *Ṣaḥīḥ Al-Bukhārī* (Riyad: Dār al-Ishbīliya, 1970), vol. 7, p. 50; Muḥammad Ibn Māja, *Sunan Ibn Māja* (Stuttgart: Thesaurus Islamicus Foundation, 2000), pp.

According to the majority of classical jurists, the apostate is given a three day grace period (*istitāba*) to reconsider his decision. If he repents, there are to be no legal consequences of any kind. However, if he does not repent, then he is by the juristic consensus (*ijmāʿ*) to be executed.⁸ Moreover, free and enslaved male and female apostates receive the same punishment according to all schools,⁹ except according to the Ḥanafis, who waive this punishment for free and slave women and instead replace it with imprisonment. This exemption is justified by the fact that the Prophet is reported to have disapproved of killing female apostates.¹⁰ The Ḥanafis viewed this exemption as valid due to the female physical disposition, assuming that the female apostate could hardly be expected to cause any threat to the Islamic state.¹¹

Modernist scholars have sometimes viewed the offence of apostasy and its juristic legal punishment as reflective of a post-Qurʾānic reality and therefore, as not covered by the explicit teachings of the Qurʾān. In fact, some have opposed the execution of the apostate (*murtadd*) and have argued that the *fiqh* teachings are based on either insufficient evidence, or that the *fuqahāʾ* show a lack of critical awareness, given that the notion of apostasy is

368-369; Aḥmad Dāwūd, *Sunan Abū Dāwūd* (Stuttgart: Thesaurus Islamicus Foundation, 2000), pp. 727-728.

⁸ Abū Dāwūd, *Sunan*, vol. 2, p. 726.

⁹ Al-Baghawī, *Al-Tahdhīb*, vol. 7, p. 288; Ibn Qudāma, *Al-Mughnī*, vol. 12, p. 264.

¹⁰ Muḥammad Al-Sarakhsī, *Al-Mabsūṭ* (Beirut: Dār al-Kutub al-ʿIlmiyya), vol. 9, p. 117.

¹¹ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 117-118; Rudolph Peters, "Apostasy in Islam", *Die Welt des Islams* 17 (1976-1977), p. 5.

often used by political authorities and the religious establishment to suppress freedom of religion.¹² As Wael Hallaq has noted,

If we go by what seems to be reliable information about the Prophet, the Qurʾān emerges as a more accurate representation of his attitude toward apostasy. It is more likely that the companion of the Prophet Abū Bakr (d. 634) was the first to be involved in putting to death a number of apostates, an action which was in the course of time perceived as the practice (*sunna*) of the Prophet. Later sources sanctioned this penalty and made a point of mentioning that the other companions approved of Abū Bakr's action.¹³

Indeed, the Qurʾānic attitude toward non-Muslims seems to be summed up in strikingly different terms: "There is no compulsion in religion. Verily, the right path has become distinct from the wrong path" (Q 2: 256).

0.2.2 Illegal sexual intercourse (*zinā*)

According to the Islamic legal tradition, sexual intercourse is only permitted within a valid marriage. A Muslim man or woman who engages in unlawful sexual intercourse commits a serious sin (*kabīra*) (Q 25:68).¹⁴ According to

¹² Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study* (Indianapolis: American Trust Publication, 1982), p. 56; Mohammad Kamali, "Punishment in Islamic Law: A Critical of the Hudud Bill of Kelantan, Malaysia", *Arab Law Quarterly*, vol. 13. No. 3 (1998), pp. 213-4; Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (Oxford: Oxford University Press, 2009), p. 277; Muhammad Shahrour, *The Qurʾān Morality and Critical Reason: the Essential Muhammad Shahrour*, translated, edited and with an introduction by Andreas Christmann (Leiden: Brill, 2009), pp. 337-8.

¹³ Hallaq, "Apostasy", p. 119.

¹⁴ According to the Sunnī schools of law, homosexuality is usually equated to unlawful heterosexual intercourse. There are different opinions about considering homosexuality as one of *ḥadd* offences. Ḥanafis did not include homosexuality in the list of *ḥadd* offences. They

the jurists, under narrowly defined circumstances, a man and a woman who have had illegal sexual intercourse are punished with a fixed punishment of either one hundred lashes scourging (*jald*) or by being stoned to death (*rajm*), depending on their legal status. In order to prove this offence, classical jurists required very strict standards of evidence; instead of the testimonies of two, those of four eyewitnesses are required. In addition, most schools hold that a confession must be made four times in four different court sessions.¹⁵ As for the Qurʾān (24:2), the only punishment prescribed for *zinā* is scourging one hundred lashes:

The fornicatress and the fornicator, flog each of them with a hundred stripes. Let no pity withhold you in their case, in a punishment prescribed by Allāh, if you believe in Allāh and the Last Day. And let a party of the believers witness their punishment.

Muslim classical jurists' consensus is that the general punishment for those unmarried ones who commit unlawful intercourse is a hundred lashes if they are free and fifty if they are slaves, followed, according to all schools except the Ḥanafīs, by banishment for a period of one year, for both men and women.¹⁶ In addition, women who are banished must be accompanied at

held that homosexuality is punished according to the judge's discretion. Cf. Peters, *Crime and Punishment in Islamic Law*, p. 61.

¹⁵ Muḥammad al-Shāfiʿī, *Al-Umm* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2002), vol. 6, pp. 183, 187; Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 60.

¹⁶ Al-Shāfiʿī, *Al-Umm*, vol. 6, pp. 182-183; Ibn Qudāma, *Al-Mughnī*, vol. 9, pp. 45-46.

their own expense by a close male relative to watch over them.¹⁷ The Mālikīs held that only male adulterers are to be banished.¹⁸

Regarding the married adulterer and adulteress, classical jurists expounded on the concept of *iḥṣān*. Being a *muḥṣan* means being an adult, free Muslim (except in the Shāfiʿī tradition, where a non-Muslim *dhimmi* can also be *muḥṣan*)¹⁹ who has enjoyed legitimate sexual relations in matrimony (regardless of whether the marriage still continues). The prescribed penalty for *zinā* of the *muḥṣan* person in the *fiqh* tradition is stoning. This is based on a number of *ḥadīth* traditions according to which the Prophet Muḥammad inflicted stoning on adulteresses and adulterers.²⁰ The most often cited narration attributed to the Prophet Muḥammad states that:

A Bedouin came to the Prophet and said: “O Messenger of God, I implore you by God to pass judgement on me in accordance with God’s Book... My son worked as a labourer for this man and then he fornicated with his wife. I was told that my son deserved to be stoned to death, so I ransomed him for one hundred sheep and a female slave. I then asked the people of knowledge and they informed me that my son deserved one hundred lashes and banishment for one year and that the woman deserved to be stoned to death.” The Prophet replied saying: “As for the female slave and the sheep, they must be returned to you. Your son deserves one hundred

¹⁷ Ibrāhīm Al-Shīrāzī, *Al-Muhadhdhab fī fiqh al-Imām al-Shāfiʿī* (Damascus: Dār al-Qalam, 1996), vol. 5, p. 395.

¹⁸ Muḥammad Saḥnūn, *Al-Mudawwana al-kubrā* (Beirut: Dār al-Fikr, 1998), vol. 6, p. 2825.

¹⁹ Al-Shāfiʿī, *Al-Umm*, vol. 6, p. 199; Ismāʿīl Al-Muzanī, *Mukhtaṣar Al-Muzanī* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993), vol. 9, pp. 276-277.

²⁰ Muḥammad Ibn al-Humām, *Fath al-qadīr* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1995), vol. 5, p. 217; Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 373; Aḥmad al-Qarāfī, *Al-Dhakhīra fī furūʿ al-Mālikiyya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2001), vol. 9, pp. 351-352.

lashes and banishment for a year. Go Unays to this man's wife and if she confesses, stone her to death." Thereupon, Unays went to the woman and she confessed. The Prophet ordered her to be stoned.²¹

0.2.3 Unfounded false accusation of committing illegal sexual intercourse (slander, calumny, defamation)

According to the legal tradition of *fiqh*, *qadhf* is either the explicit allegation (*al-qadhf al-ṣarīḥ*) that someone has had unlawful intercourse of any kind, or the denial of a person's legitimate descent, at least if his or her mother is a Muslim and a free person.²² The Qur'ān (24:4-5) stipulates that

Those who accuse honourable women but bring not four witnesses, scourge them [with] eighty stripes and never [afterwards] accept their testimony. They indeed are evildoers. Save those who afterward repent and make amends. God is Forgiving, Merciful.

According to most classical jurists, imposing the punishment for slander (*qadhf*) was both perceived as a claim of God (*ḥaqq Allāh*) and a claim of man (*ḥaqq al-ʿabd*). However, jurists disagreed as to which aspect had priority; for instance, the Ḥanafīs held that the claim of God was stronger than the claim of man. Contrary to the Ḥanafīs, the Shāfiʿīs and Ḥanbalīs held that the claim of man had priority.

²¹ Muḥammad Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Beirut: Dār al-Kutub al-ʿArabiyya, 1985), vol. 8, p. 546.

²² Al-Shāfiʿī, *Al-Umm*, vol.6, p. 277; Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 76; Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, pp. 398, 402-203; Muḥammad al-Ramlī, *Nihāyat al-muḥtāj ilā sharḥ al-Minhāj* (Beirut: Dār al-Fikr, 1984), vol. 7, p. 435; Al-Qarāfi, *Al-Dhakhira*, vol. 9, p. 378; Aḥmad Al-Khurashī, *Ḥāshiyat al-Khurashī* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), vol. 8, p. 298.

0.2.4 Theft (*sariqa*)

According to the *fiqh* tradition, it is under very strict conditions that a thief may be sentenced to amputation of the right hand. This fixed penalty is based on a Qurʾānic verse which dictates that: “As for the thief, both male and female, cut off their hands, it is the reward of their own deeds, an exemplary punishment from God” (Q 5:38). The jurists defined the *ḥadd* offence of theft very narrowly. According to the majority of the Sunnī schools, it encompasses the following elements: the surreptitious taking away of a movable property with a certain minimum value (*niṣāb*) of 3 silver dirhams or one quarter of a gold dinar, which is not partially owned by the perpetrator nor entrusted to him, and from a place which is completely locked or under guard (*ḥirz*).²³ The punishment is only applied to the Muslim who (1) has attained his majority (*bāligh*), (2) is mentally sound (*‘āqil*) and (3) is proven to have had the intention (*niyya*) of stealing, that is, not having acted under compulsion but freely.

No distinction is made between freeman and slave, male or female.²⁴

According to the majority of classical jurists, the thief’s right hand is to be cut off at the wrist; the stump is held in hot oil or fire to stop the bleeding. The

²³ Al-Shāfi‘ī, *Al-Umm*, vol. 6, p. 204; Ibn Qudāma, *Al-Mughnī*, vol. 9, pp. 94-95; Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 418; Al-Ramlī, *Nihāyat al-muḥtāj ilā sharḥ al-Minhāj*, vol. 7, p. 439; Al-Qarāfi, *Al-Dhakhira*, vol. 9, pp. 418, 419-420; Al-Khurashī, *Ḥāshiyat al-Khurashī*, vol. 8, p. 310.

²⁴ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, pp. 155, 160.

punishment is to be inflicted in public; according to some classical jurists, the thief is to be led around the town with the limb cut off hung round his neck.²⁵

0.2.5 Armed robbery (*ḥirāba*)

According to the majority of Muslim jurists, banditry is explicitly sanctioned in the Qurʾān (5:33): “The reward of those who wage war (*yuḥāribūna*) against God and His Messenger and do mischief through the land is execution or crucifixion, or the cutting off hands and feet from opposite sides, or exile from the land.” However, jurists have disputed the exact definition of the act of “waging war” (*muḥāraba*, *ḥirāba*), that is banditry, its terms and conditions.²⁶

The legal implications of banditry are expounded in the *fiqh* tradition. Muslim jurists developed a complex doctrine of banditry.²⁷ According to the majority of Sunnī jurists, the minimum element of *ḥirāba* crime is a holdup: the showing of drawn weapons in order to frighten people travelling on a public road and to prevent them from continuing their journey.²⁸ Jurists argued that it was essential that the assailants were superior in strength (that is, armed) and that the victims could not escape. The assailants’ attack had to be carried out with a high degree of violence,

²⁵ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 106; Al-Shirāzī, *Al-Muhadhdhab*, vol. 5, p. 446; Yaḥya Al-Nawawī, *Rawḍat al-Ṭālibīn* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2000) vol. 7, p. 360; Al-Baghawī, *Al-Tahdhīb*, vol. 7, p. 385.

²⁶ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, pp. 229-30.

²⁷ Abou El-Fadl, *Rebellion and Violence in Islamic Law*, pp. 51-2.

²⁸ Al-Shāfiʿī, *Al-Umm*, vol. 6, p. 213; Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 229; Al-Shirāzī, *Al-Muhadhdhab*, vol. 5, p.447.

whether in the act of murdering, stealing from, or simply terrifying people.²⁹ The Ḥanafis excluded women from *ḥirāba* crime because they viewed women as not physically strong enough to commit armed robbery.³⁰

According to all Sunnī schools apart from the Mālikīs, not only must the attackers be armed but the hold-up must take place outside the city, based on the presumption that in a city the public or the authority will come to the aid of the victims. The Shāfi'īs agreed with this and held that an attack in a city constituted banditry only if the ruler did not have the effective and sufficient power to protect his people. The jurists further agreed that aggravating circumstances consist in taking the property of the victims and killing them. Repentance of the bandits before capture precludes their prosecution for banditry, but does not exempt them from criminal responsibility for other crimes committed during the attack, such as homicide or wounding.³¹

Banditry (*ḥirāba*), according to the Sunnī tradition, is envisioned as a collective crime (*jarīma jamā'iyya*). This means that, in the opinion of all schools of law except that of the Shāfi'īs, if banditry in the sense outlined above is committed by one of the robbers, all are liable for the consequences.³² In this case, all the bandits must be sentenced to death if one of them committed murder. The Ḥanafis held that if one of the bandits was

²⁹ Al-Baghawī, *Al-Tahdhīb*, vol. 7, p. 400; Ibn Qudāma, *Al-Mughnī*, vol. 12, pp. 474-475.

³⁰ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 232.

³¹ Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, pp. 448-449; Al-Nawawī, *Rawḍat al-ṭālibīn*, vol. 7, pp. 336-364; Al-Ramlī, *Nihāyat al-muḥtāj ilā sharḥ al-Minhāj*, vol. 7-8, p. 3.

³² Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, pp. 232-3.

not legally responsible, because of insanity, none could be convicted of the *ḥadd* crime of banditry.³³

0.2.6 Drinking alcohol (*shurb al-khamr*)

According to the Qurʾān, Muslims are required to refrain from drinking alcohol (*shurb al-khamr*). The relevant verse (Q 5:90) warns Muslim “O ye who believe! Intoxicants and gambling, idols and divining arrows are abominations of Satan’s handiwork. Leave it aside in order that you may succeed.” The penalty for wine-drinking, however, is introduced only in the Prophetic tradition and that of the Companions (*ṣaḥāba*). According to the *ḥadīth*, during the lifetime of the Prophet the punishment for drinking alcohol was forty lashes. However, under ‘Umar’s regime the punishment for consuming alcohol was increased to eighty lashes. The Shāfi‘īs and the Ḥanbalīs followed the Prophetic tradition and punished the drinking of alcohol with forty lashes.³⁴ The Ḥanbalī Ibn Qudāma (d. 1223) argued that the punishment for consuming alcohol was forty lashes, based on the Prophetic practice (*ḥujja*). Ibn Qudāma argued that the punishment should not be determined by the example of the Companions; since their consensus is not valid because it does not accord with the Practice of the Prophet.³⁵ The

³³ Ibn al-Humām, *Fatḥ al-qadīr*, vol. 5, p. 304.

³⁴ Al-Shāfi‘ī, *Al-Umm*, vol. 6, p. 281; Al-Shīrāzī, *Al-Muḥadhdhab*, vol. 5, p. 458; Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 137.

³⁵ Ibn Qudāma, *Al-Mughnī*, vol. 12, p. 499.

Ḥanafīs, however, endorsed the example of ‘Umar and increased the punishment to eighty lashes.³⁶

³⁶ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 295.

0.3 Aims and objectives

The study of Islamic jurisprudence, particularly its legal literature of Islamic criminal law, specifically the *ḥadd* laws, is promising yet at the same time, a demanding area of research for several reasons.

First, the classical tradition of Islamic jurisprudence (*fiqh*) does not deal with *ḥadd* punishments and how they are justified in an overly systematic fashion. Different ways of justifying the *ḥadd* are randomly scattered, or so it would seem, over the chapters on *ḥadd* laws. From this, researchers aiming to develop a global vision of the law of *ḥadd* have to assemble the contours of the juristic doctrine of *ḥadd*.

Secondly, this research aims to criticize theories of justification of a number of *ḥadd* punishments, such as one finds, often in between the lines, in the jurists' treaties of Islamic criminal law. Such a critical reading of the classical law of *ḥadd* has, to my knowledge, not been undertaken in any systematic and sustained fashion.

Thirdly, *ḥadd* is one of the touchiest and most hotly debated issues among modern and contemporary Muslim thinkers. It encapsulates many of the perceived problems pitching Islamic modernism against Islamic traditionalism, or in fact Islam against the West, particularly with regard to the notion of 'human right'.

In Part I of this thesis, I attempt to show that early Muslim jurists did not simply content themselves by stating that the *ḥadd* are the province of God entirely, in other words, that *ḥadd* punishments are immutably

imposed upon man by the sovereign decree of God in the Qurʾān (ch. 1). On the contrary, as I intend to demonstrate, classical and medieval jurists extensively and flexibly debated *ḥadd* laws. In the course of their deliberations, they introduced numerous caveats in order to practically minimise the application of *ḥadd* punishments.³⁷ Accordingly, this research shows that the classical Islamic literature on *ḥadd* is rich and replete in various justifications concerning the severity of *ḥadd* corporal and capital punishments (chs. 2 and 3).

By contrast and by way of comparison, in Part II (chs. 4 and 5) of this thesis I examine to what extent contemporary Muslim jurists, scholars and legislators have relied on the classical tradition of *fiqh* in justifying (or in fact, in rejecting) the *ḥadd* punishments as they are currently implemented in a number of Islamic countries (ch. 4). This examination leads me to highlight a number of salient issues and arguments related to the current practice of implementation of *ḥadd* punishments, which undoubtedly were not at stake in the time of early and classical Muslim jurists. This observation raises a bigger issue, namely, the contemporary applicability of Shariʿah in general, and *ḥadd* law in particular. This research puts a spotlight on the commonplace presumption that *ḥadd* norms are immutable because they preserve God’s rights. This is a particularly challenging concern for

³⁷ Throughout Part I of this thesis I discuss the caveats related to the implementation of the *ḥadd* punishments. These caveats in recent studies of Islamic law have become known as “legal maxims”. This reflects settled juristic principles of law to which Muslim jurists appeal when confronting novel legal cases. For a discussion of juristic “legal maxims”, see Intisar A. Rabb, “Islamic Legal Maxims as Substantive Canons of Construction: *Ḥadd*-Avoidance in Cases of Doubt”, *Islamic Law and Society* 17 (2010), 63-125.

contemporary jurists, as they must find ways to harmonize this perceived immutability of *ḥadd* norms with modernity and the idea of human rights (ch. 5).

This thesis seeks to convey a more nuanced understanding of the legal doctrines of *ḥadd* in both history and today. The Muslim discourse on *ḥadd* can tell us something about Islamic law today and can provide us with a solid understating of the challenges facing Muslim reformers. This, I hope, will contribute to the project “stimulat[ing] debate among Muslims on the interpretation of the *fiqh* sources with the aim of providing greater legitimacy for human rights norms.”³⁸ With Rudolph Peters, the foremost Western expert on Islamic criminal law, I would like to suggest that “[w]ithin the heritage of classical legal doctrine, and by using methods of interpretation, it is possible to redefine the codes in such a way that they do not violate basic human rights.”³⁹

Islamic criminal law as it has been traditionally understood is obviously in conflict with international human rights conventions in several areas. However, this does not mean that Islamic Shari‘ah and *ḥadd* laws are inimical to reform. Shari‘ah is not monolithic. On the contrary, this research suggests that the Islamic law of *ḥadd* is richly diverse and open to various interpretations. I suggest that Islamic *ḥadd* laws are open to further development and reformation. Needless to say, the way *ḥadd* norms ought to

³⁸ Peters, *Crime and Punishment in Islamic Law*, p. 184.

³⁹ Ibid.

be interpreted in the contemporary context is not identical with the classical interpretations proffered in the Muslim *fiqh*.

0.3.1 Research questions and problems

This research surveys a wide range of classical legal text (*furūʿ al-fiqh*) as well as contemporary legal writings on *ḥadd* norms and the punishments associated with them. In Part I of this thesis, I attempt to question the juristic assumption about the immutability of *ḥadd*. To begin, were *ḥadd* punishments justified at all? As a matter of fact, they were, albeit not consistently and not in a systematic way. To what extent did Muslim jurists scrutinise the underlying purpose (the *ratio legis*) of *ḥadd* norms? Why did so many classical jurists shun as systematic justification of the severity of *ḥadd* laws? And with regard to those jurists who rejected all theories of justification, how could they argue that *ḥadd* norms are fixed and immutable – “divinely decreed” (*muqaddar*), as the expression has it?

As for questions that I pursue in Part II of this thesis, these concern a number of key issues that have emerged in recent debates about the applicability of Islamic criminal law, and in particular *ḥadd* punishments, such as, of course, its incompatibility with the universal notion of human rights. When we talk about the applicability of Shariʿah and in particular its criminal law parts, we are often confronted with the question of whether the violations of human rights norms found in Shariʿah criminal law can be remedied or circumvented, and what the possibilities are that the states that

still enact *ḥadd* laws (although there are few of them) will replace or amend these laws in order to comply with international human rights standards.⁴⁰

In order to ground such questions in history, we must first ask: what is the impact of the classical views of *ḥadd* punishments on contemporary understandings, applications and justifications of *ḥadd* laws in the Islamic countries? Are the justifications of *ḥadd* punishments as presented in the classical doctrine of *fiqh* sufficient for contemporary calls for applying Islamic criminal law? Can *ḥadd* punishments still claim any relevance for today's demands to apply Islamic (criminal) law? What new or 'alternative' strategies have contemporary Muslim scholars proposed in order to justify *ḥadd* punishments? By tackling all these questions, this research will contribute to a more nuanced understanding of the legal doctrines of *ḥadd* laws and their various justifications.

Throughout conducting this research, I experienced some problems and difficulties. First and foremost, I found that much of the focus of the classical jurists' discussions in regard to *ḥadd* norms was on the validity and the effectivity of the judicial procedure of *ḥadd* punishments. Indeed, here is where the emphasis lies, much more at least than on any systematic theory of justification of *ḥadd* punishments, which – the classical jurists were quite aware of this – tend to be severe. Secondly, questions arose that were never contemplated by the early jurists. For instance, the jurists never questioned whether *ḥadd* punishments were 'just' or 'unjust'. Arguably, for them,

⁴⁰ Peters, *Crime and Punishment in Islamic Law*, p. 181.

punishments could only be ‘unjust’ with regard to the ‘correct’ implementation of *ḥadd* punishments, that is, when there was a failure in the legal procedure leading to the conviction for a *ḥadd* crime and the eventual implementation of the corresponding punishment. Such a failure could consist, for instance, in inflicting the punishment in the presence of legal doubt (*shubha*). What, then, was the jurists’ concept of ‘justice’ in the law? And how much of this classical view of ‘justice’ remains relevant today? While not providing a definite answer to these difficult questions, my thesis, I hope, will enrich the debate and thus prove useful.

0.4 Literature review

For this research I have consulted a wide range of primary sources of both classical and modern treaties of Sunnī Islamic law. In addition, I have made use of works by scholars specialising in Islamic legal theory and Islamic substantive law, particularly in relation to the Islamic criminal law of *ḥadd*. For Part II of my research, I also included a number of Amnesty International reports.

0.4.1 Primary sources

I have limited my research to the legal tradition of the Sunnī schools of law.⁴¹ Legal works on *ḥadd* of the four Sunnī Schools of law, namely, the Ḥanafīs, Mālīkīs, Shāfiʿīs and Ḥanbalīs, are examined in part I of this research. In my survey of Sunnī legal strategies to justify *ḥadd*, I have picked out from the *fiqh* literature three lines of argumentation: *ḥadd* as God's right (*ḥaqq Allāh*), *ḥadd* as general and individual prevention (*zajr, radʿ*), and *ḥadd* as expiation (*kaffārāt*). I have devoted a chapter to each of these three approaches to the question.

Each school is represented by up to four prominent jurists of the classical and late classical period. From within the Ḥanafī school of law I

⁴¹ There is no doubt that it would be worthwhile to consult the Shīʿī legal manuals on the justifications of *ḥudūd* punishments. Regrettably, however, such an investigation has proven beyond the scope of the present research.

have selected al-Sarakhsī (d. 490),⁴² Ibn Nujaym (d. 970/1563)⁴³ and Ibn al-Humām (d. 861/1457). Their important compendia of Ḥanafī law, the *K. al-Mabsūt*, the *K. al-Baḥr al-rāʾiq* and the *Fatḥ al-qadīr*, have all been consulted. The Mālīkī school of law is represented by its eponym and ‘founder’, the Imām Mālīk (d. 179/759)⁴⁴, as well as two adherents to his school: al-Qarāfī (d. 684/1285)⁴⁵ and al-Khurashī (d. 1689). Their legal treaties are called the *Mudawwana*, the *K. al-Dhakhīra fī furūʿ al-Mālīkiyya* and the *Ḥāshiyat al-Khurashī* (d. 1689). For the Shāfiʿīs I have consulted the works of Imām al-Shāfiʿī (d. 204/820) and of three adherents to his school: al-Shīrāzī (d. 476/1083)⁴⁶ al-Nawawī (d. 676/1277)⁴⁷ and al-Ramli (d. 1004/1595).⁴⁸ From the Ḥanbalī School of law, Ibn Qudāma’s (d. 620/1232) *al-Mughnī fī fiqh al-Imām Aḥmad Ibn Ḥanbal* and *al-Kāfī* has been consulted in Part I.⁴⁹

For Part II of this thesis, I have classified the primary sources according to four distinct approaches to the Islamic tradition; defining each of these approaches based on the attitude they bring to the classical sources of Islamic law (Qurʾān, *ḥadīth*, consensus and *fiqh*).

⁴² Cf. N. Calder, “al-Sarakhsī”, *Encyclopaedia of Islam, Second Edition*, vol. IX, p. 35b.

⁴³ Cf. J. Schacht, “Ibn Nudjaym”, *Encyclopaedia of Islam, Second Edition*, vol. III, p. 901a.

⁴⁴ Cf. N. Cottrat, “Mālīkiyya”, *Encyclopaedia of Islam, Second Edition*, vol. vi, p. 278a.

⁴⁵ Cf. Sh. A. Jackson, “Shihāb al-Dīn al-Qarāfī”, *Encyclopaedia of Islam, Second Edition*, vol. ix, p. 435b.

⁴⁶ Cf. E. Chaumont, “al-Shīrāzī”, *Encyclopaedia of Islam, Second Edition*, vol. ix, p. 481a.

⁴⁷ Cf. W. Heffening, “al-Nawawī, Muḥyī al-Dīn Abū Zakariyyā’ Yahyā b. Sharaf b. Murī”, *Encyclopaedia of Islam, Second Edition*, vol. vii, p. 1041b.

⁴⁸ Cf. A. Zysow, “al-Ramli”, *Encyclopaedia of Islam, Second Edition*, vol. viii, p. 424b.

⁴⁹ Cf. G. Makdisi, “Ibn Qudāma al-Maḥdisī”, *Encyclopaedia of Islam, Second Edition*, vol. iii, p. 842b.

The first category of primary sources is characterized by the Salafī approach, where only a literal interpretation of the Qurʾān and Sunnah is allowed, any other Islamic traditions being completely rejected.⁵⁰ For example, a prominent Salafī scholar, the Pakistani al-Mawdudi, consistently holds that

Islam admits no sovereignty except that of God, and consequently, does not recognise any law giver other than Him... The aspect of the legal sovereignty of God is ... emphasized by the Qurʾān as pertaining to His being the only deity to be worshipped... [In addition to the Qurʾān] the sunnah constitutes the only source of divine guidance and law, as no further revealed guidance is to come to which it may become necessary for mankind to turn... It is this dispensation by Muḥammad that constitutes the supreme law which represents the will of God, the real sovereign.⁵¹

As for the Prophetic traditions recorded as his Sunnah, Mawdudi held that, next to the Qurʾān, they constitute the only source of Divine guidance and law. According to him, the Prophet was not merely the bearer of a message but also the divinely appointed leader, the ruler and teacher. The duty laid on him, Mawdudi argues, was to explain and illustrate the law of God by his words and deeds. The Sunnah is the “entire life-work of the Holy Prophet”; in conjunction with the Qurʾān, it “formulates and completes the

⁵⁰ Muhammad Rashid Rida (b. 1865 Ottoman Syria, d. 1935 Egypt), *Al-Manar Exegesis*. Cf. Emmanuel Sivan, *Radical Islam: Medieval Theology and Politics* (N.Y: Yale University, 1985); Abul ‘Aala Mawdudi, *The Islamic Law and Constitution* (Lahor: Islamic Publication, 1980); Ibrāhīm Sayyid Qutb, *In the Shadow of the Qurʾān: fī ḡilāl al-Qurʾān* (Beirut: Dār Iḥyā’ al-Turāth, 1971), and *Khaṣā’iṣ al-taṣawwur al-Islāmī wa muqawwimatuh* (Cairo: Dār al-Shurūq, 1960).

⁵¹ Mawdudi, *The Islamic Law and Constitution*, pp. 72-3.

Supreme Law of the real Sovereign, and this Law constitutes what is called ‘Sharī‘ah’ in Islamic terminology.”⁵²

Another type of primary source used in Part II of this dissertation is identified as belong to the “conservative” approach toward the accumulated tradition of *fiqh*. This is an approach that values the efforts of the classical *fuqahā’* but which tends to stress the more conservative type of *fiqh* (basically, a *fiqh* that is anti-*ijtihād* and pro-*taqlīd*).⁵³ It is exemplified by Mohamed S. El-Awa’s *Punishment in Islamic Law: A Comparative Study* (1982). El-Awa states that *ḥadd punishments* are laws that are ordained and fixed by God; he also suggests that very little has been said about the nature and purpose of Islamic criminal law. He avers that

Muslim jurists were not interested in discussing these matters as they saw these as the province of God alone. Since they have been prescribed in specific terms and are to be imposed without question, it was considered unnecessary to say much about the purposes they served or the reasons for which they were prescribed.⁵⁴

This statement, however, is misleading. As this thesis shows, jurists intensely debated *ḥadd* and their punishments, despite the fact that they regarded them as the province of God.

⁵² Ibid., p. 74.

⁵³ Muḥammad Oqla, *Niẓām al-Islām: al-‘Ibāda wa-al-‘Uqūba*: “The Islamic System: the Worship and the Punishment” (Amman: Maktabat al-Risāla, 1986); Muḥammad Qadrī, *Islamic Penal System and Philosophy* (Lahore: Minhaj al-Qur’ān Publication, 1995); El-Awa, *Punishment in Islamic Law*.

⁵⁴ El-Awa, *Punishment in Islamic Law*, pp. 23-4.

Next come the representatives of what can be called the “traditionalist” approach, which view *fiqh* in a positive light and stresses its potential for renewal (pro-*ijtihād*, anti-*taqlīd*).⁵⁵ I selected a number of prominent scholars who have written on Islamic criminal law, theory and practice. Examples of this approach are the two prominent Egyptian scholars Muḥammad Abū Zahra (b. 1898) and ‘Abd al-Qādir ‘Uda (d. 1954), and the America-based Egyptian Khaled Abou El Fadl (b.1963).

Muḥammad Abū Zahra was a renowned Egyptian Azharī jurist and a member of the Azharī Islamic Research Council. His 2006 textbook *al-Jarīma wa-l-‘uqūba fī l-fiqh al-Islāmī* (“Crime and Punishment in Islamic Jurisprudence”),⁵⁶ consists of two volumes; the first deals with crimes as defined by the classical jurists (*ḥadd*, *qīṣāṣ*⁵⁷ and *ta‘zīr*⁵⁸ offences), the second with the corresponding punishments. I classified Abū Zahra as a traditionalist jurist who has a favourable view of the *fiqh* tradition. He makes extensive references in his book to the four Sunnī schools of law. ‘Abd al-Qādir ‘Uda’s 2005 monograph *al-Tashrī‘ al-jinā‘ī al-Islāmī muqāraranan bi-l-qānūn al-waḍ‘ī*

⁵⁵ Yusuf Qaraḍāwī, *The Lawful and the Prohibited in Islam* (London: Al-Birr Foundation), 2003); Muḥammad Abū Zahra, *Al-Jarīma wa-l-‘uqūba fī l-fiqh al-Islāmī*: “Crime and Punishment in Islamic Jurisprudence” (Cairo: Dār al-Fikr, 2006); ‘Abd al-Qādir ‘Uda, *Al-Tashrī‘ al-jinā‘ī al-Islāmī muqāraranan bi-l-qānūn al-waḍ‘ī*: “The Islamic Criminal Legislation in Comparison to Man-Made Law” (Beirut: Dār al-Kutub al-‘Ilmiyya, 2005); Khaled Abou El-Fadl, *Speaking in God’s Name: Islamic Law, Authority and Women* (Oxford: Oneworld, 2001), and *Rebellion and Violence in Islamic Law*.

⁵⁶ Cf. Abū Zahra, *Al-Jarīma wa-l-‘uqūba fī l-fiqh al-Islāmī*.

⁵⁷ Cf. J. Schacht, “*Kiṣāṣ*”, *Encyclopaedia of Islam, Second Edition*, vol. v, p. 177a.

⁵⁸ On the legal concept of *ta‘zīr* see M.Y. Izzi Dien, “*Ta‘azīr*”, *Encyclopaedia of Islam, second Edition*, vol. x, p. 405b.

(“The Islamic Criminal Legislation in Comparison to Man-Made Law”)⁵⁹ also consists of two volumes. He argues that Islamic criminal law serves deterrence much more than any secular, man-made law.

Khaled Abou El-Fadl is one of the outstanding legal thinkers in contemporary Islam. His methodology, though aimed at reforming the Islamic tradition, is markedly traditionalist. One can see this in his optimistic espousal of (certain strands within) the *fiqh* tradition. For Abou El Fadl, Islamic revelation came to announce God’s purpose for humanity in a specific sociocultural context, while he also insists on the “interactive dynamic between revelation, human reflection upon nature and creation, and human perception of socio-historical experience.”⁶⁰

Finally, for Part II of this thesis, I draw on primary sources that can be characterized as belong to the “modernist” strand in Islamic thought.⁶¹ Prominent examples of modernist thinkers, all of whom see the tradition of *fiqh* highly critical and advocated a direct return to Islam sources, are Ṣubḥī al-Maḥmaṣānī (1906-1986), Fazlur Raḥmān (1919-1988), Muḥammad Shahrour (b. 1938) and Tariq Ramadan (b. 1962).

⁵⁹ Cf. ‘Ūda, *Al-Tashrī‘ al-jinā‘ī al-Islāmī muqāraranan bi-l-qānūn al-waḍ‘ī*.

⁶⁰ David L. Johnston, “Maqāṣid Al-Sharī‘ah: Epistemology and Hermeneutics of Muslim Theologies of Human Rights”, *Die Welt des Islams* 47,2 (2007), pp. 185-6.

⁶¹ Ṣubḥī al-Maḥmaṣānī, *The Philosophy of Islamic Legislation: Falsafat al-Tashrī‘ al-Islāmī* (Leiden: Brill, 1961); Fazlur Raḥmān, *Islamic Methodology in History* (Karachi: Central Institute of Islamic Research, 1965) and *Islam and Modernity: Transformation of An Intellectual Tradition* (Chicago: The University of Chicago, 1982); Shahrour, *The Qur’ān Morality and Critical Reason*; Ramadan, *Radical Reform Islamic Ethics and Liberation*.

0.4.2 Secondary sources

Historical-critical scholarship on Islamic criminal law is an underdeveloped area of academic research, and this dissertation therefore cannot rely on a great number of previous studies. However, a number of scholars have contributed to the field of inquiry, usually expressing negative views. An important early contributor to the Western study of Islamic law, Joseph Schacht (d. 1969) was of the opinion that Islam has no criminal law of note, that is, that the criminal law elements of the *fiqh* tradition lacked a coherent theory of crime and punishment.⁶² In his judgement, no “general principles” were developed in Islamic criminal law.⁶³ Noel J. Coulson seems to have shared many of Schacht’s views, but nonetheless was slightly more positive in his assessment, acknowledging the “systematic” character of Islamic legal thought. He suggested that the Islamic jurisprudence is the process of intellectual activity which ascertains and discovers the terms of the divine will and transforms them into a system of legally enforceable rights and duties. However, according to Coulson, “within these strict terms of reference... tensions and conflicts... arise.”⁶⁴ In regard to Islamic criminal law, Coulson opined that these “tensions and conflicts” were especially

⁶² Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), p. 202.

⁶³ *Ibid.*, p. 187.

⁶⁴ Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969), p. 2.

acute.⁶⁵ This thesis argues against both Schacht's and Coulson's understanding of Islamic law as an un-systematic law that accumulated randomly in the course of time.

Rudolph Peters is the author of the first full survey monograph devoted to Islamic criminal law, published over 50 years after Schacht's debatable characterization.⁶⁶ For part II of this thesis, I constantly consulted Peter's account of crime and punishment in the contemporary debate about the applicability of Islamic criminal law today. Peters surveys a number of Islamic countries where Islamic law has been applied uninterruptedly, for example, Saudi Arabia. In addition, he surveys the Islamic countries and states where Islamic criminal law was re-introduced, for example, Iran, Sudan, Nigeria's Zamfara state.⁶⁷ Furthermore, Peters provides an overview of the Muslim jurists' theory of criminal law and the practice from the sixteenth to the twenty-first century.

Though not in the form of monographs, a number of other scholars, in both east and west, have contributed to the study of Islamic criminal law. Mohamed Kamali in, "Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan" argues that *ḥadd* in the Qurʾān is meant to clarify the separation between the permissible and prohibited and that the classical jurists replaced separation with the idea of fixed punishments. According to Kamali, *ḥadd Allāh* is a broad Qurʾānic concept which is neither confined to

⁶⁵ Noel J. Coulson, "The State and the Individual in Islamic Law", *British Institute of International and Comparative Law Quarterly*; vol. 6, Issue 1., (Jan. 1957), p. 49-60.

⁶⁶ Peters, *Crime and Punishment in Islamic Law*.

⁶⁷ Cf. *Ibid.*, p. 142 to 153.

punishments nor to a legal framework but provides a comprehensive set of guidelines on moral, legal, and religious themes.⁶⁸ Kamali also accuses the early and classical jurists of following a course whereby the broad and comprehensive concept of *ḥadd* is reduced to mean an exactly quantified, mandatory and invariable punishment. As he suggests, “the conventional *fiqh* approach to the formulation of the underlying policy toward the *hudud* has failed to be adequately reflective of the Qurʾānic guidance on this subject”.⁶⁹

Asifa Quraishi’s “Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective” is a critique of the rape laws of Pakistan from an Islamic point of view which is careful to include women’s perspectives in the analysis. The main thrust of Quraishi’s article concerns the inherent gender egalitarianism in Islam that is often ignored by Muslim academics, courts and legislatures. This is evident in the example of her study, Pakistan, where cultural patriarchy has often determined the application of certain Islamic laws, resulting in the very injustice which the Qurʾān so vehemently condemns.⁷⁰

Abdel Salam Sidahmed suggests that in principle Islamic law treats men and women on an equal footing with regard to criminal offences under the Shariʿah.⁷¹ In my view, this is basically true in the case of the Qurʾān.

⁶⁸ Kamali, “Punishment in Islamic Law”, p. 204.

⁶⁹ Ibid., p. 203.

⁷⁰ Asifa Quraishi, “Her Honor: An Islamic Critique of the Laws of Pakistan from a Woman-Sensitive Perspective”, *Michigan Journal of International Law*, vol. 18, p. 287.

⁷¹ Abdel Salam Sidahmed, “Problems in Contemporary Applications of Islamic Criminal law Sanctions: the Penalty for Adultery in Relation to Women”, *British Journal of Middle Eastern Studies* vol. 28, No. 2, (No., 2001).

However, the jurists did not produce an equitable treatment between men and women, especially in their discussions of crimes of illegal sexual intercourse and apostasy. However, as will be shown in the course of this thesis, it is this Islamic jurisprudence which still guides the implementation of Shari'ah in contemporary Muslim societies.

Syed Hossein Serajzadeh explains the lower crime rate in Islamic countries by referring it to the Islamic criminal law system. Having become part of the general moral system, Serajzadeh argues, Islamic criminal law has significant influence on the individual and social consciousness of Muslims, even when it is not enforced in practice. This influence may act as a constraint that inhibits crime and consequently contributes to the low crime rate in Islamic societies.⁷²

Writing with the eye of an historian of Islamic legal doctrine, Robert Gleave argues that the focus of much classical Sunnī juristic discussion on *iqāmat al-ḥadd* (the implementation of the *ḥadd* punishment) is on offering broad reflections about the legitimacy of political rule, rather than on the actual prosecution of crime and implementation of punishments. *Ḥadd* punishments, in his view, have never been of great important in legal practice. In the course of this research, I have sought to shed some light on the jurists' lack of systematization of the justifications of *ḥadd* punishments. Gleave's suggestion offers an explanation: the jurists were not interested in thinking through the procedural details of *ḥadd* punishments. As Gleave

⁷² Syed Hossein Serajzadeh, "Islam and Crime: The Moral Community of Muslims", *Journal of Arabic and Islamic Studies* 4 (2001-2002), p. 127.

points out, *ḥadd* punishments, in the writings of the jurists, seem highly ritualistic, as if the jurists simply refuse to subject them to the usual processes of legal reasoning. This ritualism serves both religious and more overtly political purposes. This is indicated not only by the detailed stipulations regarding the punitive ‘ritual’ (the size of the stone, the exact characteristics of the whip etc.), but more fundamentally by the idea that the victim of *ḥadd* crime is God rather than the individual, and that the performance of the *ḥadd* is a form of expiation for the punished individual.⁷³

A recent contribution to the study of Islamic law, Anver M. Emon’s *Islamic Natural Law Theories* (2010), applies the theory of natural law to Islam. Natural law, Emon holds, is able to identify conditions and principles of practical right-mindedness, of what is good and proper among men and in individual conduct. He applies the natural law theory as a framework of analysis as well as an evaluative basis by which to distinguish good conduct from bad conduct. Emon argues that, in the religious context, one should not be surprised to find that theology and legal philosophy are not separate disciplines; on the contrary, they influence each other.⁷⁴ While different legal traditions come to the topic of natural law from different conceptual vantage points, one point they all seem to share is a concern for the ontological authority of reason in law. In this perspective, Islamic law, and by extension Islamic criminal law, is not entirely alien to the idea of natural human rights.

⁷³ Robert Gleave, “Public Violence, State Legitimacy: the *Iqāmat al-Ḥadd* and the Sacred State”, p. 256-75.

⁷⁴ Anver Emon, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2010), p. 7.

Indeed, in a separate article, Emon extends the theory of natural law into the legal conception of God's rights in *ḥadd* laws.⁷⁵ He shows how Sunnī jurists primarily from the 2nd/8th to the 10th/16th centuries used the conceptual heuristic of the “rights of God” and the “rights of individuals” (*ḥuqūq Allāh*, and *ḥuqūq al-‘ibād*) as an interpretive mechanism to frame their naturalistic assumptions and apply them in legal analysis to create and distribute rights, duties, and public commitments.

Focusing her attention on the caveats that the *fuqahā'* developed to preclude an indiscriminate implementation of the *ḥadd* punishments, Intisar A. Rabb examines the legal maxim “avoid the *ḥadd* punishments by strength of doubt”. She argues that as soon as the jurists began to use this maxim, which is not found in either Qur'ān or the Sunnah, a significant shift in claims to the legal authority and the asserted scope of judicial discretion occurred, as jurists debated whether and how to resolve legal and factual doubt. This, according to Intisar, was largely motivated by the behaviour of the political authorities who had exercised wide discretion over criminal matters and used it to benefit the elite. To resist such attempts of authoritarianism, many jurists promoted an egalitarian “jurisprudence of doubt”, by insisting on criminal liability for high-status offenders and

⁷⁵ Anver Emon, “Ḥuqūq Allāh and Ḥuqūq al-‘Ibād: A Legal Heuristic for a Natural Rights Regime”, *Islamic Law and Society* 13,3 (2006).

heightening claims of the authoritativeness of the *ḥadd* maxim by declaring it to be a *ḥadīth*.⁷⁶

Like Rabb's article, Christian Lange *Justice, Punishment and the Medieval Muslim Imagination* (2008) examines the attempts of the *fuqahā'* to circumscribe the application of *ḥadd* in *Sunnī* law. Lange lays out the differences in *Ḥanafī* and *Shāfi'ī* conceptions of the permissibility of analogical reasoning (*qiyās*) in the law of *ḥadd*.⁷⁷ He presents the factors that prevented the *Ḥanafī* jurists from accepting analogical reasoning in *ḥadd*. Lange's analysis is restricted to the debate of Muslim jurists in the "late-classical" period of Islamic law under reign of the Seljuq dynasty (5th/11-6th/12th c.). In this research, namely Chapter 3, I take this debate in a different direction, by focussing on debates between the *Ḥanafīs* and the other schools about whether *ḥadd* punishments can serve as expiatory acts (*kaffārāt*).

⁷⁶ Intisar A. Rabb, "Islamic Legal Maxims as Substantive Canons of Construction: *Ḥadd*-Avoidance in Cases of Doubt", *Islamic Law and Society* 17 (2010), p. 63-4.

⁷⁷ Christian Lange, *Justice, Punishments and the Medieval Muslim Imagination* (Cambridge: Cambridge University Press, 2008), pp. 183-99.

0.5 Research Methodology

This research proposes to investigate the classical tradition of Muslim jurists' teachings about *ḥadd* and in particular, whether and how they sought to justify them. The goal of the research is to elucidate the difference and variation in the jurists' legal opinions and to critically compare these traditional teachings to modern attitudes toward *ḥadd*.

Throughout this research, I carry out legal discourse analysis, offering a comprehensive and detailed reading and explanation of how *fiqh* conceptualizes the law of *ḥadd*. This involves a careful reconstruction of legal doctrines that are often highly complex, and paying close attention to the differences between the legal schools (*madhāhib*). A big challenge is to find an adequate vocabulary in English to capture these doctrines.

Methodologically speaking, however, this thesis does not merely reproduce the legal 'insider' position of Muslim jurists, whether classical or modern. As suggested by Kevin Reinhart in a recent discussion of method in the study of Islamic law, scholars should not simply mimic the traditional discourse of the *fuqahā'*, but apply the methods of historical-critical studies to the *fiqh* tradition.⁷⁸ I understand this to mean that that scholars of Islamic law must seek to apply concepts and categorizations to Islamic law that may not be found, at least explicitly, in the tradition itself. The most important way in

⁷⁸ Kevin Reinhart, "Law", in *Key themes for the study of Islam*, ed. J. Elias (Oxford: Oneworld, 2009), pp. 220-244. Cf. Christian Lange, "Crime and Punishment in Islamic History: A Framework for Analysis", *Religion Compass* 4/11 (2010), 694-706.

which this dissertation seeks to implement Reinhart's suggestion is to distinguish between three different theories of justification: a theory of deterrence (both individual and general), a theory of expiation, and a theory of *ḥadd* as a sacred obligation (a *muqaddar* norm, as the jurists say). Secondly, I also take critical aim at the classical doctrines by pointing out some of their internal inconsistencies. None of the classical (and indeed few of the modern authors) have approached the Islamic law of *ḥadd* in such a way – a fact which has often forced me to be a bit speculative in uncovering, often in between the lines, the purposes that the jurists and legal thinkers attribute to *ḥadd* punishments.

Finally, Part II of this thesis takes a general interest in the questions and approaches developed in the postcolonial study of Islam, in particular the question how traditional knowledge, such as is imbedded in the classical *ḥadd* doctrine, is accepted and/or rejected by thinkers writing in the context of the postcolonial age, marked as it is by an increased interaction between east and west, and by the impact of Western ideas and forms of government on the Islamic world. In sum, the methods embraced in this study are those of textual, historical-critical and postcolonial analysis.

0.6 Chapters outline

This research consists of two main parts. Part I concentrates on the classical tradition of Muslim jurists' theories about the religious and socio-political justifications of *ḥadd* punishments. This encompasses three main chapters. In Chapter 1 I examine some of the basic classical assumptions about the concept of *ḥadd Allāh*, lit. "God's boundary". For many jurists, the severe corporal and capital punishments of *ḥadd* were required because *ḥadd* norms were simply the province of God as "things decreed (*muqaddarāt*)" by Him. *Ḥadd*, in this light, appears as the immutable right of God, which must not be questioned in terms of purpose, wisdom (*ḥikma*) or logic. However, in the absence of any specific indication in the Qurʾān that *ḥadd* punishments are a 'fixed' right of God, I attempt in this chapter to describe a process that takes place simultaneously among the jurists, namely, a process of rationalisation of both Islamic law and Islamic theology. Jurists in fact discussed the ability of man to discern God's intention in giving humankind the gift of revelation.

In this context, I discuss the tradition of legal thought about "rights" in Islamic law (*ḥuqūq*). Etymologically, the term *ḥaqq* signifies both an obligation on one person and a claim of right on another. Classical jurists created different categories of rights and applied different rules to each category. I argue in this chapter that early Muslim jurists established various legal rules that were already founded in their understanding of the Islamic values of dignity and honour, particularly in the light of their significance for individuals and society as a whole. Furthermore, this chapter examines the

jurists' efforts in balancing the competing interests of social and individual interests. I also argue that the classical jurists attempted to ensure that *ḥadd* laws as a criminal system upheld and, when necessary, balance both society's needs (for example, by ensuring social stability) and private interests (for example, those of protecting the honour and dignity of the individual). Despite the fact that early jurists' insisted, on a theoretical level, on the immutability of the *ḥadd* law, I demonstrate that early Muslim jurists did not hesitate to set and create rules and caveats, often with little connection to Qur'ānic or Prophetic precedents, to avoid a broad implementation of *ḥadd* punishments.

In Chapter 2, I examine the discourse of certain jurists who justify *ḥadd* punishments by claiming that they serve general deterrence (*zajr*) and individual deterrence (*radʿ*). I argue that Sunnī jurists characterise *ḥadd* punishments as deterrents (*zawājir*) particularly when they seek to justify the most severe *ḥadd* punishments, that is, capital and severe corporal punishments. I highlight that the classical jurists regularly debate God's purpose behind legislating these severe punishments. The majority of these jurists agree that God's ultimate aim is to evacuate the earth from obscene and indecent acts forbidden in revelation.

However, as I suggest, Muslim jurists' assumptions about *ḥadd* punishments – that is, that they *always* deter people from (re-)committing the crime – was not realistic but often inaccurate. One does not even have to rely on 'modern' criminal law theories about the deterring power of punishment. In fact, the classical Muslim jurists themselves were involved in endless

dispute about this – which shows that they were well aware of the fragility of arguments about deterrence. One can see this in their discussions about repeated *ḥadd* offences (are they to be punished repeatedly?) and the overlap of various *ḥadd* offences (which offence must be punished?). I argue that the jurists themselves had an inkling of the inability of *ḥadd* punishments to achieve individual prevention.

It is true, however, that such an inkling was never systematically pursued by the jurists or turned into a fully developed argument. There is no sustained single attempt to question the inefficacy of *ḥadd* punishment and whether it functions as a deterrent for *ḥadd* offenders. Deterrence is questioned in the context of *khilāf*, or disagreement between the legal schools, but is never doubted as such. Theories of deterrence will vary depending on whether schools follow a direct literal interpretation of the Qurʾān and the Prophetic Sunnah, or whether they take other sources of legal norms into consideration, such as consensus (*ijmāʿ*), analogical extension (*qiyās*), or the commonweal (*al-maṣlaḥa al-ʿamma*).

Chapter 3 examines the justification of *ḥadd* punishments as expiatory acts to amend and atone for the committed *ḥadd* offences. Although this particular justification is probably the most widespread conventional justification for the *ḥadd* punishment it was, however, the least discussed among Sunnī jurists. This may be due to the inclusion of both the *ḥudūd* and the *kaffārāt* among the *muqaddarāt*, that is, the “divinely ordained norms”. I demonstrate throughout the chapter that *ḥadd* punishments and *kaffārāt* were viewed in close conceptual proximity to each other and that the notion of

ḥadd law was conveyed as the sanctioned law that is imposed (*muqaddar*) upon humankind by the sovereign decree of God.

Part II of the research consists of two chapters. It is devoted to examining modern and current debates about the implementability of *ḥadd punishments*. In Chapter 4 I examine a number of trends within contemporary Muslim thought and attempt to show how representatives of each of these trends position themselves vis-à-vis traditional legal doctrines regarding the *ḥadd* punishments. While the question as to how contemporary thinkers relate to traditional Islamic jurisprudence is of great importance, Chapter 5 discusses how new emphases and foci in the legal debate, largely unrelated to the traditional knowledge produced in Islamic jurisprudence (*fiqh*), have vehemently emerged in recent debates on the implementation of *ḥadd* laws. I survey the countries where Islamic criminal law is enacted and implemented. This survey includes recent examples of *ḥadd* corporal and capital punishments carried out in these countries, examples that are often reported by Amnesty International and other human rights organisations.

Ch. 1: *Ḥadd* punishments as God's rights (*Ḥaqq Allāh*)

1.1 Introduction

This chapter serves to introduce basic juristic concepts in the legal doctrine of *ḥadd*, in particular the notion that *ḥadd* punishments are either a “right of God” (*ḥaqq Allāh*) or a “right of the individual” (*ḥaqq al-ādamī*), or indeed both, sometimes to equal, and sometimes to differently weighed degrees. Throughout this endeavour to systematise *fiqh* strategies for the justification of *ḥadd* punishments, a key theme is the juristic assumption that *ḥadd* punishments must be seen as things once and for all determined, or decreed by God (*muqaddara*), representing His absolute sovereignty in forbidding and permitting acts in the Qurʾān, and His absolute “right” to be obeyed. A basic juristic justification of *ḥadd* punishments consists in declaring *ḥadd* ordinances to be norms that are decreed or “divinely ordained” by God (*muqaddarāt*), that is, fixed and immutable norms. But did this mean that there was no scope for legal reasoning at all in the law of *ḥadd*? After all, Muslim jurists held that the ultimate purpose of this Divine law is to maintain religion, life, offspring, reason and property – did this assumption not apply to *ḥadd*?

While in this chapter I emphasize justifications of *ḥadd* punishment as the right of God (*ḥaqq Allāh*), I also wish to draw attention to the fact that Islamic law is not ‘totalitarian’ in the sense that, for example, the rights of God *always* override the rights of the individual. As I show, in many instances

the opposite is in fact the case. I also wish to introduce the basic concept of the intentionality of the Law and of God's purpose in legislating it, because it serves as an important backdrop, not only to the rest of this chapter, but to the whole thesis. The chapter's structure and objectives are as follows.

First, I briefly introduce the historical debate on how early and late Muslim classical jurists viewed the aims and the objectives of the Divine Law of Shari'ah. Thus, the concept of *maṣlaḥa* (the common good) will be dealt with as a legal principle. Due to the fact that classical jurists treated *ḥadd* punishments as a province of the law that is uniquely under the control of God, the reference to the jurists' legal dispute about God's purpose in revealing the law (His *ratio legis*) and whether this is discernible through revelation or reason is of great importance to this endeavour. The tension between God's absolute power in decreeing His law and the human need to interpret and 'think through' the law prompts many questions: To what degree does the law of *ḥadd* depend on an exact knowledge of God's intention in revealing the law? To what extent can God's intention be known, in order that we can determine His rights? What did Muslim theologians think about the concept of "God's limits or boundaries"? Does this concept reveal itself to have different meanings in theology and law? Were the rights of God comprehensible to Muslim jurists? Can *ḥadd* punishments be set aside or become modified but God's intention still be fulfilled? Do *ḥadd* punishments hold intrinsic value in themselves? Can God's rights be rationalised from both a theological and law perspective?

Secondly, after elaborating on the ways in which early Muslim theologians and jurists responded to the dilemma of the human capacity in comprehending the *ratio legis* of the divine norms, I examine the juristic justification of *ḥadd* punishments as the rights of God. I exemplify this through an analysis of a selected number of *ḥadd* offences and punishments, all of which are justified as rights belonging to God. Finally, I discuss a number of juristic exceptions: cases in which Muslim jurists make the *ḥadd* punishment inoperative, regardless of the fact that they consistently held that *ḥadd* punishments are “decreed” by God and that the punishment is immutable and fixed.

1.2 The *Maqāṣid al-Sharī‘ah* and the concept of *Maṣlaḥa*

According to the majority of Muslim Sunnī jurists, God has objectives in legislating His law, the Sharī‘ah. God’s law is a law which encompasses aims and purposes (*maqāṣid*, sg. *maqṣad*); if this law is correctly implemented, these aims and purposes will be achieved. These laws, according to the jurists’ manuals, are to bring about the *maṣlaḥa* (public interest, or commonweal) of humankind: “the laws were instituted only for the benefit of the believers in this world and the next”.⁷⁹ The concept of *maṣlaḥa* has a central importance in the legal debate about the purpose of God’s legislation. Generally speaking, *maṣlaḥa* encompasses the welfare and

⁷⁹ Cf. Robert Gleave, “Maqāṣidal Sharī‘ah (a)”, *Encyclopaedia of Islam, Second Edition*, vol. xii, p. 569b.

commonweal of Muslims, the “general good” or the “public interest”.⁸⁰ The majority of Muslim jurists held that anything that helps to avert harm (*ḍarar*) and furthers human welfare (*manfaʿa*) is equated with *maṣlaḥa*.

Gleave indicates that, when one claims that the Shariʿah has *maqāṣid*, or is all about *maqāṣid*, one is making a statement concerning the rational nature of the Shariʿah: that God intends to bring about a certain state of affairs by instituting a particular law, and that this relationship between the law and the law’s larger aims, or purposes, is discernible by human reason.⁸¹ According to Khadduri, the Mālikī scholar Anas b. Mālik (d. 179/795) is reputed to have been the first jurist to make decisions directly on the basis of *maṣlaḥa* “through the use of *istiṣlāḥ* or *al-maṣlaḥa al-mursala*.”⁸² However, he also suggests that “no clear evidence... has yet come to light indicating that Mālik had used *maṣlaḥa* as a concept of law”,⁸³ which indicates that the use of *maṣlaḥa* as a legal institution was only introduced at a later point in time. Similarly, Opwis relates that rulings based on considerations of *maṣlaḥa* or the social good are found in legal writings as old as the 2nd/8th and 3rd/9th

⁸⁰ Felicitas Opwis, “Maṣlaḥa in Contemporary Islamic Legal Theory”, *Islamic Law and Society* vol. 12, no. 2, (2005) p. 183.

⁸¹ Gleave, “Maqāṣid al-Shariʿah”, p. 569b.

⁸² According to Khadduri, “the first important case in which the notion of public welfare (*al-khayr and nafʿ*) was invoked as a basis for legal decision was the land of southern Irāq (al-Sawād), which the Caliph ʿUmar decreed should become the state-land and a land tax (*al-kharāj*) was imposed on it [...] the caliph came to the conclusion that the interests of the community as a whole would be better served if the Sawād were brought under the state control would, he argued, bring about greater welfare and utility for the believers.” Cf. Madjid Khadduri, “Maṣlaḥa”, *Encyclopaedia of Islam, Second Edition*, vol. vi, p. 738b.

⁸³ Khadduri, “Maṣlaḥa”, p. 738b.

century.⁸⁴ Gleave argues that the concept of *maqāṣid* originated in attempts of early Muslim theologians to rationalise both theology and law, particularly the Muʿtazilī attempts to rationalise the divine message. He argues that

[t]he doctrine of *maqāṣid* al-Sharīʿah has its roots in early Muslim attempts to rationalise both theology and law. In terms of the theology, the ideas of the Muʿtazilīs undoubtedly influenced the emergence of the *maqāṣid* doctrine. The Muʿtazilī doctrines that God’s decrees are subject to, rather than the origin of, the ideas of good and evil ultimately resulted in an assertion that God is compelled to act in the interests of humankind. His law must be of benefit to his creation, for it was not, His qualities of justice and goodness would be compromised.⁸⁵

The breakthrough for the concept of *maṣlaḥa* in the history of Islamic legal theory, according to Opwis, came in the late 5th/11th century when the Shāfiʿī jurist Abū Ḥāmid Muḥammad al-Ghazālī (d. 505/1111) “defined *maṣlaḥa* in a tangible manner”.⁸⁶ In *al-Mustasfā fī ʿilm al-uṣūl*, al-Ghazālī approached a definition of the aims of the Lawgiver by exploring the term *maṣlaḥa*. He writes:

Maṣlaḥa is about bringing about benefit (*manfaʿa*) or averting harm (*maḍarra*). What I mean by *maṣlaḥa* is everything that preserves the intention of the Law, and the intention of the Law for people is five-fold: preservation of people’s religion (*dīn*), life (*nafs*), reason (*ʿaql*), offspring

⁸⁴ Opwis, “Maṣlaḥa in Contemporary Islamic Legal Theory”, p. 187.

⁸⁵ Gleave, “Maqāṣid al-Sharīʿah”, p. 569b.

⁸⁶ Opwis, “Maṣlaḥa in Contemporary Legal Theory”, p. 188.

(*nasl*) and property (*māl*). The contrary is regarded as corruption (*mafsada*) and to prevent this is required for *maṣlaḥa*.⁸⁷

Al-Ghazālī argued that God’s purpose in revealing the Divine Law is to preserve for mankind the five essential elements of their well being, namely, religion, human life intellect, offspring and property. These five essential elements are considered “necessities” (*ḍarūriyyat*); they *must* be protected in order to achieve *maṣlaḥa*. It is relevant for our concept that al-Ghazālī includes *ḥadd* punishments among the examples of this: killing the apostate and the *ḥadd* punishments for drinking alcohol, adultery, slander, theft and banditry.⁸⁸ Opwis argues that al-Ghazālī’s conception of *maṣlaḥa* as the purpose of God’s law and linking it to the preservation of five tangible criteria was a significant development. This is because, as Opwis argues, his theory of *maṣlaḥa* reconciled two intellectual approaches in Islamic thought toward moral knowledge, the rationalist and the subjectivist position. The rationalist position had held that humans could understand the rationality of Sharī‘ah norms, while the subjectivist position had argued that their rationality was only accessible to the mind of God Himself.⁸⁹

The Mālikī *uṣūlī* scholars Shihāb al-Dīn al-Qarāfī (d. 684/1285) and al-Shāṭibī (790/1388), two important late-medieval theorists of

⁸⁷ Muḥammad al-Ghazālī, *al-Mustaṣfā min ‘ilm al-uṣūl* (Cairo: Al-Maṭba‘a al-Amiriyya, 1904), p. 287.

⁸⁸ Al-Ghazālī, *Mustaṣfā*, pp. 287-8.

⁸⁹ Opwis, “Maṣlaḥa in Contemporary Legal Theory”, p. 188.

maṣlaḥa,⁹⁰ proposed when writing about the *maqāṣid al-Sharī‘ah* that “the obligations entailed by the law are intended for the purpose of fulfilling its objectives among human beings.”⁹¹ In reference to the Lawgiver, the term ‘wisdom’, or ‘wise purpose’ (*ḥikmah*) is used synonymously with the term intention (*qaṣd*), even though “jurisprudents tend to use the term ‘wise purpose’ more frequently than the term ‘intention’”.⁹² For al-Shāṭibī, these objectives of the Law fall under one of three categories: essentials, exigencies, and embellishments.⁹³ With regard to the essential objectives or interests these are basically al-Ghazālī’s *ḍarūriyyāt* and consist of the following: religion, human life, progeny, material wealth and human reason. Every religion prescribes a means of preserving these five entities.⁹⁴ The five aforementioned essential interests are viewed as the foundations of all worldly interest. Thus, the whole aim of Islamic legislation is to promote the

⁹⁰ Maribel Fierro, “al-Shāṭibī”, *Encyclopaedia of Islam, Second Edition*, vol. ix, p. 364a.

⁹¹ Ahmad al-Raysuni, *Imam al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law* (London: The International Institute of Islamic Thought, 2005), p. 108.

⁹² Al-Raysuni proposes that “the natural sphere for attention to the objectives of Islamic law is that of Islamic jurisprudence (*fiqh*) and its fundamentals (*uṣūl al-fiqh*); concern for these objectives is evidenced in the work of both fuqahā’ and uṣūliyyūn, the former group’s emphasis being upon detail and practical application, and the latter’s on theorization and the laying foundations”. Cf. Ahmad Al-Raysuni, *Imam Al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law*, p. 2.

⁹³ Ibid, p. 108.

⁹⁴ Al-Raysuni writes: “Islamic law undertakes to preserve essential interests, as well as others, in two complimentary ways. The first of these is by preserving their existence, that is, by legislating that which will bring them into being, then perpetuating and nurturing their existence. The second of these ways is by protecting them from annihilation, that is, by preventing that which would lead to their disappearance, destruction or neutralization, be it a presently existing reality or something which is anticipated”. Cf. Ibid., p. 109

welfare of the believers, and is profoundly embedded in preserving the five essentials: religion, human life, progeny, material wealth and human reason.

It is noteworthy that the theory of *maṣlaḥa* as the ultimate ‘source’ of the Law allows for a certain flexibility in how the Law is applied. For example, the Ḥanbalī jurist al-Ṭūfī (d. 716/1316) wrote that “all rules derived from analogy are susceptible to change and development if the aims of the Lawgiver are not fulfilled.”⁹⁵ Accordingly, the law as presented by the proponents of the theory of *maṣlaḥa* can be changed and adapted to changing circumstances through the use of analogical reasoning.

Maṣlaḥa is the unchanging ‘purpose’ (*qaṣd*) of God; by extension, it is His will and His ‘right’ that the objectives of the law, especially the five essentials, are at all times protected. As the example of al-Ghazālī illustrates, the jurists would often see *ḥadd* punishments as being in complete harmony with their understanding of the Lawgiver’s objectives that are at the centre of the theory of the *maqāṣid al-Sharī‘ah*. In fact to Muslim jurists, the *ḥadd* punishments seemed to have a direct and privileged connection with the “highest objectives” of God. This theme will be further explored later in this thesis, including in the sections devoted to contemporary legal discourses on *ḥadd*.

1.3 The concept of rights (*al-ḥuqūq*) in the Islamic Legal Tradition

⁹⁵ Cf. Opwis, “Maṣlaḥa in Contemporary Legal Theory”, p. 195. On al-Ṭūfī’s biography, see W. P. Heinrichs, “Al-Ṭūfī” *Encyclopaedia of Islam, Second Edition*, vol. x, p. 588a.

Etymologically, the term *ḥaqq* (pl. *ḥuqūq*) refers to something incumbent upon one to undertake. The Arabic expression: “there is a *ḥaqq* on you to do s.th.” (*ḥaqq ‘alayka an taf‘ala shay’*) means: “you are obliged to do s.th.” (*wajaba ‘alayka*). Consequently, *ḥaqq* refers to a duty, either toward an individual or the community. According to the jurists, in some cases, the interest may be a private one; in others it may be a public one. However, *ḥaqq* signifies both an obligation toward one person and a claim or right vis-à-vis another.⁹⁶

The concepts of *ḥaqq Allāh* and *ḥaqq al-‘ibād* are not Qur’ānic or Prophetic concepts, rather they are concepts coined by early Muslim jurists. Emon argues that Muslim jurists used the expression “*ḥaqq Allāh*” to refer to the well-being of society, that is, as a shortcut for communal, ‘public’ interest. This right of the community must be upheld by the imam or ruler, given his power over society. As Emon states, “[i]n light of this juristic usage, the phrase ‘rights of God’ is used here as a term of art to represent the social good that must be effectuated by the imām.”⁹⁷

Emon is conscious of the fact that *ḥaqq* signifies both an obligation and a claim or right. However, he objects to the translation of *ḥuqūq Allāh* as “rights of God” as this translation, he argues, is inappropriate and relatively inaccurate. His rejection rests on the Sunnī jurists who held that,

⁹⁶ Muḥammad Ibn Manẓūr, *Lisān al-‘Arab* (Beirut: Dār Ṣādir, 1992), vol. 10, pp. 50-1; Wehr, *Dictionary of Modern Written Arabic*, pp. 191-2.

⁹⁷ Emon, “Ḥuqūq Allāh and Ḥuqūq Al-‘ibād”, p. 329.

theologically speaking; God does not litigate, and is free from any need.⁹⁸ The theoretical significance of the *ḥaqq Allāh* vs. *ḥaqq al-ʿibād* distinction, Emon argues, is best understood in light of a context peculiar to jurists, namely the context of legal arguments, reasoning, and analysis. He argues that “jurists were embedded in a social context; but they were also products of a specific legal education and training. This legal context gave them a language and conceptual grammar that serve as a window to their understanding of the legal enterprise itself.”⁹⁹

According to the Islamic legal theory of *ḥuqūq*, the general theory of “rights” is subdivided into three categories, each category having its own exclusive legal implications. These categories are as follows: (1) the absolute right belonging to God (*ḥaqq Allāh*), (2) the individual’s right (*ḥaqq khālīṣ lil-ʿabd*), (3) a mixed right of God and the individual (*ḥaqq mukhtalaf fīh*). According to the majority of the four Sunnī schools of law, God’s right is interpreted as His explicit commands and prohibitions in the Qurʾān and the Sunnah. Sunnī jurists held that “the punishment for the forbidden deeds committed by people is a right that belongs to God (*al-jazāʾ ʿalā al-afʿāl al-muḥarrama min al-ʿibād yakūnu ḥaqqan li-Allāh*)”.¹⁰⁰ Since God legislated the forbidden deeds in the Qurʾān, their punishments are projected to be His exclusive rights.

⁹⁸ Al-Ramlī, *Nihāyat al-muḥtāj*, vol. 8, p. 7.

⁹⁹ Emon, “Ḥuqūq Allāh and Ḥuqūq Al-ʿibād”, p. 334.

¹⁰⁰ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 155.

As to the individual's right in *ḥadd* laws, the individual's interests are limited mainly to retaliation (*qiṣāṣ*) and in the false accusation of committing illegal sexual intercourse (*qadhf*). While not all of God's rights have an element of an individual right in them, the classical jurists advocated that in every individual's right there is a right of God (*wa mā min ḥaqq lil-ʿabd ila wa fihi ḥaqq li Allāh*).¹⁰¹ The mixed right, the third category, is when God's right and the individual's interest are in conflict, for example, in the case of brigandage (*ḥirāba*).

According to the four Sunnī schools of law, *ḥadd* offences are those for which the violator (*muʿtadī*) is subjected to a fixed punishment, which is required to satisfy a right of God (*ʿuqūba muqaddara wājiba ḥaqqan li-Allāh*).¹⁰² The jurists also included rules and norms that uphold purely public interests, “to rid the world from transgression and abominations” (*ikhlāʾ al-arḍ ʿan al-maʿāṣi wa al-fawāḥish*), ending up by identifying them as *ḥuqūq Allāh*.¹⁰³ Accordingly, the rights of God represented those public interests that primarily served the public well-being (for example, security, stability and order). Moreover, these interests, according to the classical jurists, were legislated with the aim of ridding the world of corruption (*ikhlāʾ al-arḍ min al-mafāsid*) and to maintain a higher degree of security and order. Furthermore, a right of God represents the public interest because the given

¹⁰¹ Al-Qarāfī, *Al-Dhakhira*, vol. 9, p. 394.

¹⁰² Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 155; Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 3; Al-Shīrāzī, *al-Muhadhdhab*, vol. 5, p. 444.

¹⁰³ Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 8.

role to the Muslim ruler by allowing him to impose duties on individuals and the ruling authority. As Emon argues, “*ḥuqūq Allāh/ḥuqūq al-‘ibād* debates manifest an early regime of Islamic natural rights that illustrates the priority of neither the right nor the good, but rather the good and the right are symbiotically related.”¹⁰⁴

In order to show how these general ideas are applied in the law, I turn to the juristic treatment of a number of specific *ḥadd* offences and the punishments that are associated with them, namely, the *ḥadd* of theft (*sariqa*), of false accusation of illegal sexual intercourse (*qadhf*), and of banditry (*ḥirāba*).

1.3.1 The example of the punishment for *sariqa*

In this section I examine the justification of the *ḥadd* punishment for theft (*sariqa*) as it is developed in classical *fiqh* writings. The stress here is on the idea that this punishment is a right that belongs to God. The general *fiqh* rule is that once *ḥadd* offences, with the exception of *qadhf*, reach the Islamic judge (*qāḍī*), the nature of the right changes from being purely a private right to being public;¹⁰⁵ this is in consideration of the role of the Muslim ruler and the institutions of his authority to effectuate the public good.

The Sunnī jurists’ view that *ḥadd* is a right or a claim of God (*ḥaqq Allāh*) has a number of doctrinal and procedural consequences that I want to

¹⁰⁴ Emon, “*Ḥuqūq Allāh and Ḥuqūq al-‘Ibād*”, pp. 327-8.

¹⁰⁵ *Ibid.*, p. 344

describe briefly before focusing in on theft proper. First, this concerns the nature of the prosecution of the crime. In reference to the offence of *zinā*, Sunnī jurists held that the penalty for illegal sexual relations is purely a right of God. Now, nobody can claim to ‘represent’ God and litigate in His stead for ‘His’ right to be satisfied. Therefore, the ruling authority may not actively prosecute the offence; it can initiate the charges against those who have engaged in illegal sex only in case of confession or once four witnesses report the case to the judge. Obviously, the interest underlying the *zinā* punishment was seen by the jurists not to involve any private interests. Instead, the aim is to uphold the common good.¹⁰⁶

Secondly, *ḥadd* punishments as rights of God cannot be pardoned once the offence is brought before the judge, for nobody can assume to speak in God’s name in the matter.¹⁰⁷ For instance, the Ḥanafī Ibn Nujaym held that the *ḥadd* punishment is never to be waived, especially when the Islamic authority has been notified about the committed offence (*al-ḥadd la yuqbal al-isqāṭ muṭlaqan ba‘da thubūti sababihi ‘inda al-ḥākim wa ‘alā hadhā yubnā ‘ala ‘adam jawāz al-shafā‘a fih*).¹⁰⁸ According to Ibn Nujaym, “*ḥadd* is a punishment determined by God (*al-ḥadd ‘uqūba muqaddara li-Allāh*); therefore, pardoning is completely inadmissible (*li-dhālika lā yaṣluḥu fih al-*

¹⁰⁶ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 284-5.

¹⁰⁷ Al-Qarāfī, *Al-Dhakhīra*, vol. 9, p. 463; Ibn Nujaym, *Al-Baḥr al-rā‘iq*, vol. 5, p. 3; Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, pp. 443-4; Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 169.

¹⁰⁸ Ibn Nujaym, *Al-Baḥr al-rā‘iq*, vol. 5, p. 3.

‘*afw*’.”¹⁰⁹ This is based on a *ḥadīth* according to which the Prophet condemned the Companion ‘Usāma’s intervention in a theft offence committed by a woman.¹¹⁰

Thirdly, once the judgment is passed, the Islamic ruler (*imām*) has a special involvement in carrying out the punishment. In reference to the *ḥadd* of illegal sexual intercourse, the consensus of the jurists is that the *zinā* punishment is a right belonging to God; from this follows that the Muslim ruler is the only person entitled to inflict the punishment (*al-aṣl tafwīḍ al-ḥadd ilā al-imām li-annahū ḥaqq li-Allāh*).¹¹¹ The exclusive prerogative (and duty) of the Muslim ruler to inflict the *ḥadd* punishment was seen by jurists as an important characteristic of the law of *ḥadd*. One senses here that the idea of the right of God is closely tied in with the notion of the public interest, which the ruler is obliged to uphold. Similarly, the capital punishment for apostasy and the corporal punishment for theft are only to be implemented by the Muslim ruler (*la yumlikuhā ilā al-imām*).¹¹²

A final relevant characteristic of the *ḥadd* rules regarding theft is that the *ḥadd* punishment for theft can only be based on two different kinds of evidence. This first kind is that two just witnesses testify that the thief has stolen an object which neither belonged to him nor had been entrusted to him. The victim’s presence in the process of adjudication is required to

¹⁰⁹ Ibid., p. 3.

¹¹⁰ Aḥmad Al-Nasāʿī, *Sunan al-Nasāʿī* (Stuttgart: Thesaurus Islamicus Foundation, 2000), vol. 2, p. 796.

¹¹¹ Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 388.

¹¹² Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 51; Al-Shīrāzī, *al-Muhadhdhab*, vol. 5, p. 388.

validate the witnesses' testimony and avoid any doubts about the ownership of the stolen object.¹¹³ The second way is for the thief to confess of committing the theft. This confession is directly in the presence of the judge, and the owner of the stolen property does not have to be present for it.¹¹⁴

1.3.1.1 The Ḥanafī view

According to the *fuqahā'*, amputation for theft is stipulated in the Qurʾānic verse that reads: “regarding the male and female thieves, cut their hands as punishment for what they did as a warning from God” (Q 5:38). The consensus among the Ḥanafī jurists is that if a thief retains possession of the stolen good, he is not only subjected to amputation but must also return the stolen property to its owner (*idhā quṭiʿa fa-kānat al-sariqa bāqiya ruddat ilā mālikiha*).¹¹⁵ The corporal punishment for theft that is stipulated in the Qurʾān and practiced by the Prophet according to the Sunnah is the amputation of the right hand. The Ḥanafīs held that the amputation of the right hand for theft was a punishment for having invoked a pure right of God, an offence so serious that the ruling authority must redress it regardless of the victim's wishes.¹¹⁶ This position is endorsed by a *ḥadīth* according to

¹¹³ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 122.

¹¹⁴ Al-Shāfiʿī, *Al-Umm*, vol. 6, p. 214.

¹¹⁵ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 113.

¹¹⁶ In this section I focus on the juristic discussion of the offence of theft in as much as it is dealt with and redressed by the Islamic authority. In other words, I have examined the justification of the *ḥadd* punishment for theft as a ‘pure’ right of God, not as the ‘mixed right’ where the private right of an individual is violated simultaneously with ‘God’s right’. A detailed discussion of the private right to compensation (*ghurm* or *ḍamān*) in theft cases,

which the Prophet said: “Excuse the *ḥudūd* among yourselves, but whatever *ḥadd* reaches me I must fulfil.”¹¹⁷ In other words, if individuals wish to forego their right to bring evidence for a *ḥadd* offence before the judge they are free to do so. But once the accusation has reached the judge, he is obliged to act upon it, examine the evidence and pass judgment. The jurists stress time and again that victims of *ḥadd* crimes must file a petition to the Islamic authority to seek redress if they wish the offence to be prosecuted.¹¹⁸

All Sunni schools of law held the juristic opinion that if the stolen property remains with the thief, his right hand is amputated and he must return the stolen property. However, unlike the other schools of law, the Ḥanafis argued that if the stolen property is destroyed (*talifat*) before the thief is brought to justice, the thief is not subjected to compensation in addition to amputation. Instead, the thief is liable only to amputation for violating a right belonging to God.¹¹⁹ The Ḥanafis based their position on a *ḥadīth* according to which the Prophet said that “if the thief’s hand is amputated he is not to pay compensation (*idhā quṭi‘at yad al-sāriq lam yughrām*)”.¹²⁰ Ḥanafī jurists held that the Qurʾān (5:38) requires only *one* punishment, that is, the amputation for the right hand. For them, to impose liability for compensation in addition to the amputation not only contravenes

including in cases where the stolen property is consumed or otherwise destroyed, is offered by Emon, “Ḥuqūq Allāh and Ḥuqūq al-‘Ibād”, pp. 358-72.

¹¹⁷ Abū Dāwūd, *Sunan*, vol. 2, p. 731.

¹¹⁸ Al-Sarakhsī, *al-Mabsūṭ*, vol. 9, p. 171; Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 122.

¹¹⁹ Al-Sarakhsī, *al-Mabsūṭ*, pp. 185, 186.

¹²⁰ *Ibid.*, p. 186.

the Qurʾānic stipulation of a single punishment, but also violates the *ḥadīth* tradition that asserts that no compensation is due from a thief who has suffered amputation.¹²¹ This may reflect the Ḥanafīs’ reluctance to speculate about the things decreed by God (*muqaddarāt*). As the Ḥanafīs stressed, the *muqaddarāt* in the law are “things whose purpose cannot be apprehended in order to infer judgments (*lā yumkinu taʿaqqulu l-maʿnā li-l-taqdīr*)”.¹²² As in other areas of the law of *ḥadd*, the Ḥanafīs here advocate a reduced and more lenient approach to the *ḥadd* punishments.

Pursuing a similar line of caution, the Ḥanafīs regarded the issue of compensation as marred by doubt. In legal terminology, there is “legal doubt” (*shubha*) in claiming there must be compensation in addition to the corporal punishment. However, according to a well-established legal maxim (*qāʿida*), legal doubt invalidates *ḥadd*.¹²³ To explain their position in greater detail, they acknowledged that the theft offence violates both the right of God and the private right of the individual. Where the stolen goods remain in the thief’s hand, the thief must return them to the owner in fulfillment of the private right, while suffering the amputation satisfies the right of God. The Qurʾānic verse stipulates amputation as the only punishment for theft; using

¹²¹ Ibid., pp. 185-186.

¹²² This view is reported in Sayf al-Dīn Abū l-Ḥasan ʿAlī b. Muḥammad al-Āmidī (d. 631/1233), *al-Iḥkām fī uṣūl al-aḥkām* (Beirut: Dār al-Kitāb al-ʿArabī, 1404/1983), vol. 4, p. 65. For Ḥanafī references, cf. Lange, *Justice, Punishment and the Medieval Muslim Imagination*, 188.

¹²³ Cf. Maribel Fierro, “Idraʿū l-ḥadd bi-l-shubuhāt when: lawful violence meets doubt”, *Hawwa*, 5 no 2-3 (2007), p 208-238; Rabb, “Islamic Legal Maxims as Substantive Canons of Construction”.

the term *jazā'* linguistically refers to the completion or sufficiency of an act (*mā yajibu li-Allāh fa-tamāmuhu bi al-istifā' fa-lā yajibu al-ḍamān li-l-'abd*).¹²⁴

1.3.1.2 The Shāfi'ī, Mālikī and Ḥanbalī view

The Shāfi'īs and the Ḥanbalīs argued that the thief is subjected, even if the stolen object has been destroyed, to both amputation and to compensation (*wa-in atlafā al-sil'a quṭi'a wa-yaḍman qīmatahā idhā fātāt*).¹²⁵ This argument rests on the fact that the Shāfi'īs and Ḥanbalīs judged that two interests are violated in the act of theft (*sariqa*), and that both must be vindicated. The Shāfi'ī jurist al-Shīrāzī argued that satisfying the public interest by inflicting the *ḥadd* punishment does not abrogate the requirement for the satisfaction of the private right by compensating the victim when the property is destroyed (*al-ḍamān yajibu li-ḥaqq al-ādamī wa-l-qat' yajibu li-Allāh fa-lā yamna'u aḥaduhumā al-ākhar*).¹²⁶

The Shāfi'īs held that the punishment of amputation (*qat' al-yad*) fulfils the right of God because theft violates the sanctity of Sharī'ah (*li-hatki ḥurmat al-shar'*). Compensation, on the other hand, is a private right and is required because of the loss incurred by the owner's property (*li-ihlāk mālihi*). Accordingly, satisfying one right does not necessarily negate the other.¹²⁷

¹²⁴ Al-Sarakhsī, *al-Mabsūṭ*, vol. 9, p.186.

¹²⁵ Al-Shāfi'ī, *Al-Umm*, vol. 6, p. 212; Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 448.

¹²⁶ Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 448.

¹²⁷ *Ibid.*, p. 448.

Likewise, the Ḥanbalī jurist Ibn Qudāma argued that both the right of God and the private right are at stake in the crime of theft. For Ibn Qudāma, if the stolen property remains in the thief's possession, he is required to return it. Compensation is required when the property is destroyed.¹²⁸ Amputation and compensation constitute fulfilment of two rights that are both legitimate rights for the two right holders (God and the victim), so it is permissible to unite them (*fa-jāza ijtimā'uhumā*).¹²⁹ To negate one because of the other would endanger the public interest in deterring theft through *ḥadd* liability, and the individual's security in his possession and ownership.

The Mālikīs advocated a middle position. First of all, they supported the requirement that the victim of theft must petition at the judge's court, that is, the judge may not prosecute the crime by himself. This procedure aims to achieve balance between the victim's right to privately satisfy his own interests with the ruler's need to uphold order and security as part of the public good.¹³⁰ With regard to how much punishment the thief must receive, the Mālikīs shared the Ḥanafīs' concern that where the property in question is destroyed, the thief may suffer two punishments for a single underlying offence. To avoid penalizing the thief twice, especially when the Qur'ān ordains only one punishment, that is the amputation of the right hand, they struck a balance between a dual and single liability scheme. They argued that a thief is subjected to amputation but his liability to compensate depends on

¹²⁸ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 113.

¹²⁹ Ibid.

¹³⁰ Al-Qarāfī, *Al-Dhakhirah*, vol. 9, p. 463.

whether he is capable of paying the amount to the victim. In case the thief suffers from economic hardship between the time he steals the property and the time his hand is amputated, he is not liable to pay any compensation. If, however, he is wealthy enough to afford compensating the victim, he must do so.¹³¹

The Mālikīs add that if the thief was impoverished between the time of the theft and the amputation but becomes wealthy thereafter, he is still not liable for compensation (*la yalzam al-ta'wīḍ idhā aysara ba'da al-ʿadam, li-anna l-ʿadam asqatahā ʿanhu*).¹³² The economic hardship from the time of the infraction to the punishment's phase negates any and all liability to remunerate the victim.

1.3.2 Man's rights (*ḥuqūq al-ʿibād*): The example of the punishment for *qadhf*.

The punishment for false accusation of committing illegal sexual intercourse (*qadhf*) is set forth in Qurʾān 24:4-5:

And those who level a charge against chaste women and do not bring four witnesses, whip them eighty lashes and do not accept their testimony ever, for they are corrupt; except for those who repent thereafter and act righteously. Indeed God is Forgiving and Merciful.

¹³¹ Ibid.

¹³² Ibid., p. 464.

Sunnī jurists agreed that the punishment for false accusation of illegal sexual relations (*qadhf*) is eighty lashes, as stipulated in the Qurʾān. However, they intensely contested whether the punishment for *qadhf* is intended to uphold a right exclusive to God or a private right belonging to the Muslim individual.¹³³ As Emon remarks, “much of the debate about the purpose of the *qadhf* punishment concerns the good that it satisfies.”¹³⁴ The notion that *ḥadd* for *qadhf* is an immutable right of God that simply must be implemented is not very prominent in *fiqh* writings. Mostly, the good (*manfaʿa*) of the *qadhf* punishment is described by Muslim jurists either as the presumed deterrent effect (*zajr*) of the actual punishment (*al-maqṣūd min sharʿ al-zawājir ikhlā al-ʿālam ʿan al-fasād*),¹³⁵ or as the retributive effect for an attack on the individual’s personal dignity and honour (*ḥaqq al-ʿabd shurīʿa li dafʿ al-ʿār ʿan al-maqdhūf*).¹³⁶ The legal schools weigh these two factors differently, however.

1.3.2.1 The Shāfiʿī and Ḥanbalī view

Shāfiʿīs and Ḥanbalīs held that in the offence of false accusation of committing illegal sex, the individual’s right of protecting his honour (*ʿird*) and dignity (*karāma*) is primarily at stake.¹³⁷ They consistently argued that the punishment for *qadhf* vindicates the individual’s honour and dignity, thus

¹³³ Al-Shirāzī, *Al-Muhadhdhab*, vol. 5, p. 409; Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 77.

¹³⁴ Emon, “Ḥuqūq Allāh and Ḥuqūq al-ʿIbād”, p. 338.

¹³⁵ Cf. ch. 2 of this thesis.

¹³⁶ Ibn al-Humām, *Fatḥ al-qadīr*, vol. 5, p. 312.

¹³⁷ Al-Shirāzī, *Al-Muhadhdhab*, vol. 5, p. 409; Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 67-77.

emphasizing the notion of the individual's right (*ḥaqq al-ʿabd*). However, they also acknowledged that in cases of *qadhf* the rights of God and a private right of an individual are intertwined.¹³⁸

Generally speaking, the emphasis on the impact of *qadhf* on the public or personal interest depends on how jurists defined the primary purpose of the *qadhf* punishment. The juristic debate about whether the *ḥadd* for *qadhf* involves mostly a right of God or a private right has also consequences for the determination of the right to plead the *qadhf* case before the Islamic ruler. The victim's right (*ḥaqq al-maḥdhūf*) to initiate the *qadhf* case (*muṭālaba*) and to have it prosecuted are said to depend on which interests weigh heavier. The Shāfiʿis and the Ḥanbalis held that when an individual right is mostly at issue, the victims will have a greater flexibility in whether and how they press their claim against the person who has slandered them.¹³⁹

The Shāfiʿis argued that the Muslim ruler (*imām*) has no right to apply the *qadhf* punishment if the injured victim did not raise the *qadhf* issue and voice his desire for redress.¹⁴⁰ For the jurists to require the individual's petition (*muṭālaba*) reflects their view that a personal right is primarily at stake in *qadhf*; otherwise, the judge could reach a judgment on his own initiative as, for example, in a *zinā* offence.

While the Shāfiʿis at times also acknowledge that *qadhf* infringes on both a private right and a right of God, they were inclined to view that in

¹³⁸ Ibid.

¹³⁹ Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 410; Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 77.

¹⁴⁰ Al-Ramlī, *Nihāyat Al-Muḥtāj ilā Sharḥ al-Minhāj*, vol. 7, pp. 437-8.

most *qadhf* cases the private right is paramount. One way of expressing this idea is to say that the right of the individual is prevailing (*ghālib*); thus, the victim must file a petition and he is entitled to waive his right to compensation if he wishes to do so. Shāfi‘īs and Ḥanbalīs relied on a *ḥadīth* according to which a man named Abū Ḍamḍam pardoned his accuser and waived the punishment for *qadhf*; the Prophet is reported to have asked, urging people to emulate Abū Ḍamḍam: “Is it that difficult for any of you [the Companions] to be like Abū Ḍamḍam and say I gave up my honour as a charity (*taṣaddaqtu bi ‘irdī*)?”¹⁴¹ Al-Shīrāzī remarks on this particular *ḥadīth*: “Giving up the right to one’s honour can only be achieved through forgiveness (*wa-l-taṣadduq bi-l-‘ird lā yakūnu illā bi-l-‘afw*).”¹⁴² Ḥanbalī jurists adopted a view similar to the Shāfi‘īs. Their position about *qadhf* is that the interest at stake is a private interest, especially given that redress can be waived by the victim, as in the case of talionic punishment, which is widely regarded as an individual right (*wa-lanā annahu ḥaqqun la yustawfā illā ba‘da muṭālabat al-ādamī bi-stifā‘ihi fa-saqāta bi ‘afwihi ka-l-qīṣās*).¹⁴³

1.3.2.2 The Ḥanafī view

The Ḥanafīs held that the more *qadhf* reflects a right of God (for them this is tantamount to the common good), the less discretion the victim will

¹⁴¹ Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 409.

¹⁴² *Ibid.*, p. 409.

¹⁴³ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 77.

have in vindicating the wrong.¹⁴⁴ In contrast to the Shāfi'is and the Ḥanbalis, the Ḥanafis usually stressed that *qadhf* represents a right of God. This was the dominant view among the Ḥanafī jurists, who did not allow the injured party to waive the claim.¹⁴⁵ They claimed that the *ḥadd* of *qadhf* is a claim of God. However, they required the victim to file a petition. This requirement seems confusing and could reveal a certain inconsistency in the Ḥanafis' logic.

The point the Ḥanafis raised was this: If *qadhf* infringes on a right of God, surely the forgiveness of the victim negate God's right and undermine the public welfare? Jurists consistently attempted to identify and define the underlying purposes of *qadhf* and the issue of whether it predominantly preserves the interests of the public society or the private rights of the individual. But to what degree and in what sense does *qadhf* infringe upon a right of God? The Ḥanafis regarded the *qadhf* punishment as of benefit to the public interest because in their view, through its deterrent effect, it rids the world of evil. In this context, the *qadhf* punishment invokes a right of God since it does not pertain to any one person, but is in the general interest of the whole society. This equation between the general interest of society and God's interest is, as Emon has suggested, a characteristic of Ḥanafī thought. He writes that "[t]he public interest that is corroborated by the social good of the society and the effect of the punishment by deterring people from the evil

¹⁴⁴ Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 60; Ibn al-Humām, *Fatḥ al-qadīr*, vol. 5, p. 312.

¹⁴⁵ Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 60; Ibn al-Humām, *Fatḥ al-qadīr*, vol. 5, p. 312.

that may adversely affect the common welfare was greatly emphasized in the Ḥanafī doctrine.¹⁴⁶

1.3.2.3 The Mālikī view

In this question, the Mālikīs were the only school that consistently attempted to take a middle position, balancing between the competing interests of God and of the individual by issuing specific rules that ultimately aimed at satisfying the genuine needs of both the social good and private interests. The Mālikī jurists held that *qadhf* touches upon both a public interest and a private one; it is a mixed interest, where a right of God and a personal right are intertwined. Mālikī jurists argued that the redress for *qadhf* is contingent on the victim filing a petition (*lā yaqūmu bi-l-ḥadd illā l-maqdhūf*).¹⁴⁷ But once the injured petitions for redress, he can no longer waive his rights.¹⁴⁸ This may convey that before the petition is filed to the judge, the individual right of the plaintiff outweighs the right of God/the public, while after the petition, the opposite is true, and as such the ruling authority must carry out the punishment without hesitation.

As mentioned, the jurists debated whether the accused could forgive the culprit. The Shāfi'īs and the Ḥanbalīs, who considered the punishment for *qadhf* to be based first and foremost on a private right, granted the individual the discretion to waive his right, both before and after filing a petition to the

¹⁴⁶ Emon, “Ḥuqūq Allāh and Ḥuqūq al-‘Ibād”, p. 356.

¹⁴⁷ Al-Qarāfī, *Al-Dhakhira*, vol. 9, p. 394.

¹⁴⁸ Ibid.

legal authority to grant him satisfaction. The Ḥanafīs, on the other hand, emphasized that the punishment of *qadhf* served a right of God, conceived as the imperative to protect social cohesion. Mālikī jurists, however, attempted to strike a balance between these two positions, by distinguishing between pre-petition and post-petition situation. Once the accusation is brought before the judge the individual is denied the right to waive the punishment; the punishment is then carried out for the public interest as a right of God.¹⁴⁹

The Mālikīs' hesitation in choosing one or other option, aiming to adhere to a middle position, can also be seen in the fact that they make an exception to the rule that the plaintiff cannot waive his right after lodging his complaint before the judge. The plaintiff *has* this right if he promises that in the future he will avoid further public attention and practice *sitr*, that is, “covering-up” of the perceived sins of others.¹⁵⁰ The Mālikīs do not specify the ways in which the judge should regard the avoidance of further public attention. In other words, the judge is completely free to decide what would cause avoidance of further public attention. This position suggests that the basic intrinsic value of dignity predominantly attaches to the individual's right; thus, it cannot be redressed except with his express desire and intent.

The consensus of the majority of the Muslim jurists, except the Ḥanafīs, was that the punishment for *qadhf* upheld both public and private interests. It was only the jurists of the Ḥanafī and to a lesser extent, the Mālikī school of law, who focused on the deterrent effect of the *ḥadd*

¹⁴⁹ Ibid., p. 393.

¹⁵⁰ Al-Qarāfi, *Al-Dhakhira*, vol. 9, p. 392; Al-Khurashī, *Ḥāshiyat al-Khurashī*, vol. 8, p. 308.

punishment for *qadhf*, which they viewed as satisfying a right of God (*ḥaqq Allāh*). But this is not the dominant position. As Emon notes, “the debate on *qadhf* among the four Sunnī schools of law suggests that background concepts like dignity, however defined, affected how jurists constructed rules of law.”¹⁵¹ I am inclined to agree with Emon that the dignity and the honour of the individual were dominant in the mind of the Muslim jurists; they saw the protection of dignity and honour as the underlying purpose of the *ḥadd* of *qadhf*. Therefore, they endorsed rules that empowered the victim, such as the exclusive power to lodge a petition, the power to wave the punishment (in some cases even after the proceedings have already started), and heritability of the individual right. In sum, therefore, the classical doctrine of the *ḥadd* for *qadhf* lends support to the view of Khaled Abou El Fadl that the individual in Islamic law is not at all times and not entirely subjected to “God’s right”, but that the rights of the human individual can in many instances override God’s right.¹⁵² As Emon remarks,

[t]his debate is not simply a technical question of pleading and practice. Rather, the rules of pleading and practice are the legal means for manifesting fundamental juristic commitments to the value of dignity as reflected in the nature of individuals and the social good [...] the larger debate on *ḥuqūq Allāh/ḥuqūq al-‘ibād* arguably promotes a vision of society.¹⁵³

¹⁵¹ Emon, “Ḥuqūq Allāh and Ḥuqūq al-‘Ibād”, p. 358.

¹⁵² Cf. Khaled Abou El Fadl, *Islam and the Challenge of Democracy* (Princeton: Princeton University Press, 2004), p. 26-7.

¹⁵³ Emon, “Ḥuqūq Allāh and Ḥuqūq al-‘Ibād”, p. 358.

1.3.3 The Mixed Rights (*ḥuqūq mukhtalaṭa*): The example of the punishment for *ḥirāba*

Since not all *ḥadd* norms can be neatly divided into either the rights of God or individual rights, classical jurists created a third category of mixed interests or rights (*ḥuqūq mujtami'a*, *ḥuqūq mukhtalaṭa*), in which both public and private interests were at stake. As we have seen in the last section, the *ḥadd* of *qadhf* was considered by some jurists, that is, the Mālikīs (and to some extent, the Shāfi'īs and Ḥanbalīs), as precisely this kind of “mixed right”. The *ḥadd* of banditry (*ḥirāba*) is another case in point. When a bandit engages in a *ḥirāba* crime, and is thereafter apprehended by the authorities, the Sunnī legal tradition provides varying types of redress depending on an assessment of the preponderant interest, whether public (*ḥaqq Allāh*) or private (*ḥaqq al-ʿibād*). According to the four Sunnī schools of law, this mixed category contains two subcategories of mixed claims of rights, one in which the right of God is dominant (*ghālib*), the other in which the individual right weighs heavier.¹⁵⁴

The *ḥirāba* offence, as discussed in the Sunnī writings, is an example of a crime where the rights of God and the private rights of the individual are equally intertwined. A question often raised in the juristic debate about *ḥirāba* is how to identify and priorities the different interests embedded in the rules concerning banditry, where the private rights often

¹⁵⁴ Saḥnūn, *Al-Mudawwana*, vol. 6, pp. 2889-90.

seem to conflict with the right of God. Sunnī jurists tended in some cases to argue that the public interest was more paramount and, therefore, the private right or interest of the victim was ignored, particularly when denying the victim the right to forgive (*‘afw*) the culprit. However, in different instances, jurists were more inclined to value the private interest and regard it as the paramount element, as for example, in the Shāfi‘ī and Ḥanbalī view of the *qadhf* offence.

All Sunnī jurists held that, if bandits (*muḥāribūn*) repented of their crime prior to being captured, the punishments listed in the *ḥirāba* verse satisfying the rights of God all become void.¹⁵⁵ This juristic position rests on the Qur’ānic verse (5:34), which stipulates that those who repent prior to capture are forgiven any liability for the punishment. The juristic debate about *ḥirāba* often began by speculating on various hypothetical scenarios of the crime. The jurists then attempted to balance the rights of God and the rights of individuals, specifically whenever a conflict between the rights of God and the individual occurred. The four Sunnī schools of law acknowledged that, in the case of the *ḥirāba* offence, a serious conflict arises between the demands of a right of God (*ḥaqq Allāh*) and a private right of the individual (*ḥaqq al-‘abd*). The challenge for the jurists was to resolve these conflicts in an effective manner, and in particular, to maintain “conceptual coherence with their views concerning *sariqa* and *qadhf*”.¹⁵⁶

¹⁵⁵ Al-Sarakhsī, *Al-Mabsūt*, vol. 9, p. 233; Al-Nawawī, *Rawḍat Al-ṭālibīn*, vol. 7, p. 368; Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 129.

¹⁵⁶ Emon, “Ḥuqūq Allāh and Ḥuqūq al-‘Ibād”, p. 377.

1.3.3.1 The Ḥanafī view

The Ḥanafīs consistently held that, if bandits repent of their crimes prior to being captured, the punishments of *ḥirāba* as listed in the Qurʾān are no longer to be applied. However, all private rights of the victims of the *ḥirāba* crime are preserved, including, for example, the right to retaliation (*qiṣāṣ*).¹⁵⁷ If, however, the bandits are captured before they repent, the Ḥanafīs' position on conflicted rights is that the punishments for the rights of God are to be inflicted and not to be waived for the individual's right.¹⁵⁸ For instance, al-Sarakhsī held that if bandits committed murder, the punishment for banditry was inflicted, but the victims' heirs could not pursue their rights under the aspect of retaliation (*qiṣāṣ*). Neither could the victims press for any individual rights to compensation for injuries sustained, nor could they forgive the offender because this would have denied a right of God (*wa-ʿafw al-awliyāʾ fī dhālik bāṭil li-anna hadhā ḥadd yuqām li-Allāh*).¹⁵⁹

Al-Sarakhsī regarded the right to compensation for injuries as invalid once the punishment for banditry has been inflicted. However, in cases where the punishment is dropped for some juristic reason, such as repentance, then the individual is entitled to pursue his private claims. For instance, when the bandits steal property and injure the victims, their hands and feet are amputated from opposite ends; this is to satisfy the right of God

¹⁵⁷ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 233; Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 115.

¹⁵⁸ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 231.

¹⁵⁹ *Ibid.*, vol. 9, p. 231.

that is injured by the banditry offence, while the individuals' rights are dismissed entirely. Obviously, the Ḥanafīs allowed the bandits to be only liable to the rights of God. Liability for banditry punishment and liability for compensation cannot coexist (*lā yajtami'ān*). Therefore, God's right is always the priority and the judge must fulfil the right of God through application of the *ḥadd* penalty, and the individual rights are dismissed.

The Ḥanafīs discussed three different hypothetical scenarios where the rights of God and the rights of the individual are both at stake. The first scenario is where there is no capital punishment involved in the committed offences. The example presented in the Ḥanafī *fiqh* is where the culprit commits illegal sexual intercourse, theft, false accusation of committing illegal sexual intercourse and injures someone's eye. All these rights are to be fulfilled and punishments should proceed in the order of severity.¹⁶⁰ The second scenario is where the rights of God are combined and mixed and where capital punishment is involved. All God's corporal punishments of *ḥadd* punishments become void and capital punishment is to be inflicted. For instance, when the *ḥadd* punishment for *zinā* offence overlaps with *ḥirāba*, the latter negates the former.¹⁶¹

The final and the most complex scenario is where the rights of God and the rights of individuals combine and are mixed. In this scenario the private right is prioritised, but only according to the rule of first-come-first-serve. Suppose someone commits murder in *ḥirāba*. The punishment for

¹⁶⁰ Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 115; Ibn al-Humām, *Fath al-qadīr*, vol. 5, p. 326.

¹⁶¹ Ibn al-Humām, *Fath al-qadīr*, vol. 5, p. 133.

murder is retaliation, that is, the right of an individual. But execution for the *ḥirāba* crime is required as God's right. The proposed solution in such a conflict of rights is that, if the murder was committed first and *ḥirāba* committed second, satisfying the private right of retaliation is prioritised (*qadama al-qīṣāṣ li-ta'akkud ḥaqq al-ādami*) and execution for committing *ḥirāba*, that is, the right of God, is abandoned. However, in case where the bandit commits banditry first and murder second, the private right is abandoned. In both cases, a private right is touched upon. Whether it excludes a right of God or not depends on whether it is injured first-in-time.¹⁶² Suppose someone is sentenced to both stoning for committing illegal sexual intercourse (a right of God) and execution as retaliation for murder (a private right). In this hypothetical scenario the Hanafis prioritised the retaliation punishment.¹⁶³ But only if the murder was committed *before* the illegal sexual intercourse. Jurists argued that the judicial authorities must rely on a first-in-time rule to determine which right to vindicate.

1.3.3.2 The Shāfi'ī and Ḥanbalī view

Shāfi'īs and Ḥanbalīs held a similar position, arguing that God's rights are abandoned if the bandits repent prior to capture. However, private rights (restoration of the lost property and/or retaliation for suffered injuries) are not abandoned, and only the holder of the right can waive his/her rights. For instance, if the bandit commits *ḥirāba* and repents prior to capture but has

¹⁶² Ibid, p. 133.

¹⁶³ Ibid.

killed and injured, he is accountable for the individuals' rights.¹⁶⁴ According to the prominent Shāfi'ī jurist al-Muzanī, all *ḥirāba* crimes prior to capture become void in such a case, but private rights of the individuals do not (*lā tasquṭ ḥuqūq al-ādamiyyīn*). The Shāfi'īs held that God's rights do not negate the individuals' rights of seeking redress, in particular in injuries (*lā yamna' ḥaqq Allāh ḥaqq al-ādamiyyīn fī al-jirāh*).¹⁶⁵

The Ḥanbalīs argued that, if bandits repent prior to capture, the rights of God become void but private rights, for example, *qisās* and compensation, do not. Whether liability for another *ḥadd* offence committed in the course of banditry is dropped was a matter of contentious debate among the Ḥanbalīs. What is clear is that even if all *ḥadd* liability dropped, liability for private rights remained intact unless the right holder waived his right.¹⁶⁶ Against the Ḥanafīs, Shāfi'īs and Ḥanbalīs consistently emphasised private rights over the rights of God. They held that private rights cannot be forgiven by the judge because they are premised on conditions of scarcity (*taḍayyūq*) and paucity (*shuḥḥ*) and, as such, cannot be ignored without causing the individual to suffer: “the rights of people cannot become void except by the right holder's consent because they are built on scarcity and paucity (*mabnī 'alā al-dīq wa-l-shuḥḥ*), unlike the right of God.”¹⁶⁷ The idea

¹⁶⁴ Al-Shīrāzī, *Al-Muḥadhdhab*, vol. 5, p. 453.

¹⁶⁵ Al-Muzanī, *Mukhtaṣar*, vol. 9, p. 280; Al-Ramlī, *Nihāyat al-muḥtāj*, vol. 8, p. 10; Al-Shīrāzī, *Al-Muḥadhdhab*, vol. 5, p. 453.

¹⁶⁶ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 131.

¹⁶⁷ Al-Ramlī, *Nihāyat al-muḥtāj*, vol. 8, p. 7; Al-Nawawī, *Rawḍat al-tālibīn*, vol. 7, p. 370; Ibn Qudāma, *Al-Mughnī*, vol. 9, pp. 133, 134.

here is that God, given that He is all-powerful, is in need of nothing; the waiving of His “right” cannot possibly harm Him. But humans are weak and needy, and rely on the assurance that their rights will be satisfied.

Accordingly, the juristic general principle here is that the individual’s right always prevails over the right of God.¹⁶⁸ Individuals are viewed as being less capable of bearing the cost of injuries than the public at large. The rule here is that the private rights (*ḥuqūq al-‘ibād*) take priority when they are in conflict with God’s rights.

Suppose that bandits are liable to punishment *qua* God’s right and, therefore, must have their right hands and left feet amputated, and the same bandits also happen to be liable for violating private rights by either cutting off someone’s hand and foot, and are thereby condemned to have their own right hands amputated according to the law of retaliation (*qiṣās*). This conflict exists between what the right of God requires and what the private right demands through the victim’s (or his/her heir’s) right to *qiṣās* or compensation. Shāfi‘ī and Ḥanbalī jurists prioritised the individual’s rights over God’s right. They suggested that God’s rights can easily be abrogated in favour of the individual’s rights, because God is far beyond such needs. God’s right in the sense of public interest, furthermore, is so wide-ranging and vague that the cost of abrogating a right of God has little factual impact,

¹⁶⁸ Al-Ramlī, *Nihāyat al-muḥtāj*, vol. 8, p. 7: *al-aṣl fī ijtimā‘ ḥaqqiḥi ta‘ālā wa-ḥaqq al-ādami taghlīb al-thānī li-kawnihi mabnī ‘alā al-taḍayyūq*.

since it is evenly distributed across society and thus not burdensome to individuals.¹⁶⁹

Another balancing scheme is posited by al-Shīrāzī. He argued that a conflict of rights arises if a bandit both steals and amputates someone's right hand and left foot. In reference to the banditry crime, the bandit who steals suffers amputation of his right hand and left foot for violating a right of God. But under the law of retaliation, he must lose the same limbs in function of the private rights of his victim. If one right is satisfied, the other is not. In line with the other Shāfi'is, al-Shīrāzī judges that the ruling authority must apply the individual retaliation penalty because of the general emphasis placed on the individual right (*ḥaqq al-ʿabd*). Al-Shīrāzī suggests, however, that when the private rights are fulfilled, the rights of God are not necessarily abrogated. Rather would the bandit also lose his left hand and right foot to satisfy the rights of God.¹⁷⁰ The punishment here is inflicted for stealing in an act of banditry. Thus, the amputation of the right hand and left foot for a right belongs to God. Meanwhile, the amputation of the right hand is required, according to al-Shīrāzī, for retaliation (*qiṣāṣ*) the liability arising out of the individual's injury sustained by the victim, that is, the private right. Emon argues that "[t]he point for al-Shīrāzī, though, is to balance the interests posed by competing and distinct sets of rights, while prioritizing

¹⁶⁹ Ibn Qudāma, *Al-Mughnī*, vol. 9, pp. 134; Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 452.

¹⁷⁰ Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 452.

private rights given the presumed greater need for individuals to have their rights satisfied.”¹⁷¹

The Shāfi‘īs and Ḥanbalīs were not willing to negate individual rights over God’s rights and vice versa, holding instead that when both rights conflict, a proper balance of interests must be achieved if possible. However, in the Shāfi‘īs’ and Ḥanbalīs’ debate about conflicting rights, one can clearly see that, if satisfying the private right conflicts with upholding God’s right, the former is to take priority.¹⁷² Both schools of law provide two examples of such a conflict. The first is when someone commits apostasy and murder and is therefore subjected to capital punishment for both offences. The second concerns a thief who is subjected to having his right hand amputated for theft (that is, a right belonging to God) *and* to amputation of the right hand for retaliation for cutting off someone’s right hand (a private right). In such cases, the private right of *qiṣāṣ* takes priority over the right of God.¹⁷³

However, the Shāfi‘īs and the Ḥanbalīs did not ignore public interests. For instance, if the private right involves property interests and the right of God involves amputation or execution, the private rights should be enforced first and take priority, but the right of God is also to be satisfied.¹⁷⁴ If there is no execution or amputation involved under either a private right or a right of

¹⁷¹ Emon, “Ḥuqūq Allāh and Ḥuqūq al-‘Ibād”, p. 383.

¹⁷² Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 133.

¹⁷³ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 133, Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 452.

¹⁷⁴ Ibid.

God, the right of God should be satisfied first.¹⁷⁵ Both rules concern the order of satisfying rights, but do not necessarily involve the abrogation of rights.

However, if both rights involve the same sort of punishment, that is capital punishment or the same corporal punishment, the private right is still prioritised (logically, but not practically). Further explanation of this point is afforded by the example of a thief who steals a guarded property. This crime demands amputation of the right hand to satisfy the right of God and compensation to vindicate the private right. In this conflict, Shāfi'is and Ḥanbalis proposed that the victim be compensated before the thief has his right hand amputated.¹⁷⁶ When both rights require physical punishment of the offender, the purpose underlying the right of God (that is, deterrence) is upheld implicitly by the satisfaction of the private right. However, when there is no execution or amputation under either a private right or right of God, the right of God should be satisfied first.¹⁷⁷ Both rules concern the order in which rights are to be satisfied, but do not involve the abrogation of any right.

1.3.3.3 The Mālikī view

Mālikī jurists shared a similar argument with the Shāfi'is and the Ḥanbalis: the bandit who repents prior to capture is not subjected to the penalties of *ḥirāba*, but is required to compensate the victims for injuries and

¹⁷⁵ Al-Ramlī, *Nihāyat al-muḥtāj*, vol. 8, p. 10.

¹⁷⁶ Al-Nawawī, *Rawḍat al-ṭālibin*, vol. 7, p. 372.

¹⁷⁷ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 132.

damaged properties.¹⁷⁸ They held that only the *ḥadd* punishments specified in the *ḥirāba* verse become void with repentance prior to capture. By comparison, in instances of committing illegal sexual intercourse (*zinā*), consuming alcohol (*shurb al-khamr*) and false accusation of committing illegal sexual intercourse (*qadhf*), both the rights of God and private rights remain intact.¹⁷⁹

However, the Mālikīs held that not all private rights are to be satisfied in all cases. This rests on their position about the mixed right of God and individuals. As al-Qarāfī puts it, “when God’s rights and the individuals’ rights overlap the punishment for God’s right is what comes first because it cannot be pardoned (*wa in ijtama‘ ḥadd Allāh wa-ḥadd al-‘ibād budi’a bi-ḥadd Allāh li-ta‘adhdhur al-‘afw fīhi*)”.¹⁸⁰ For instance, if murdering and stealing is committed in act of *ḥirāba*, the culprit should be punished with a capital punishment for murdering, unless the victim’s heirs waived the punishment. In this case he is to be punished with amputation and must compensate.¹⁸¹ For instance, they argued that if the punishment for *ḥirāba* was inflicted, then at least in the case of a stolen property, the bandit must compensate the victim if it is possible for him to do so. If not, the liability for compensation becomes void and the victim’s private rights are sacrificed. Mālikīs tended to

¹⁷⁸ Ṣaḥnūn, *Al-Mudawwana*, vol. 6, p. 2889.

¹⁷⁹ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 130.

¹⁸⁰ Al-Qarāfī, *Al-Dhakhira*, vol. 9, p. 470; Ṣaḥnūn, *Al-Mudawwana*, vol. 6, p. 2890.

¹⁸¹ Al-Qarāfī, *Al-Dhakhira*, vol. 9, p. 470.

negate the liability for private rights in specific conditions, aiming to protect the culprits from potential multiple liabilities.

In the case of the *ḥirāba* offence, Sunnī jurists sought to balance competing interests that benefitted both society and the individual. In the debates of the *fuqahā'* their schools' respective attitude toward government play a vital role when it comes to prioritising the various interests, in particular when these are in conflict. For the Ḥanafīs and the Mālīkīs, the public interest was paramount, therefore, they leaned toward protecting the social good, which they saw best upheld by government. The Shāfi'īs and the Ḥanbalīs held that the individual interests, for example property and physical injury, are paramount. Society as a whole, they argued, could afford to bear and spread the cost of violations of the social good better than the individual could, given the individual's fragility. The Ḥanafīs consistently prioritised the rights of God over private rights. The Shāfi'īs and the Ḥanbalīs emphasised private rights over the rights of God. The Mālīkīs attempted to strike a balance between the different rights.

1.4 Dismissing God's Rights (waiving the punishment)

Although Muslim classical jurists insisted on declaring *ḥadd* punishments to be the immutable law of God and on claiming that the offence, once brought to the judge, must be punished, they defined a plethora of exceptions, that is, possibilities for avoiding the *ḥadd* punishment. According to the Sunnī tradition, God's rights can in fact be waived under specific conditions discussed in the *fiqh* writings.

In this section, I focus on two cases widely discussed in the writings of Muslim jurists. The first case is the dispute about waiving God's right when it conflicts with another of His rights. For instance, suppose a person is seeking immunity (*amān*) from the Muslim ruler and is subsequently given the status of immunity seeker (*musta'min*). If the immunity seeker commits any of the *ḥadd* offences while he is enjoying Muslim protection, Sunnī jurists debated whether the punishment must become void on the basis of "conflicted rights" or whether the punishment must be inflicted irrespective of the refugee's status. The second case deals with waiving the rights of God on the basis of doubt (*shubha*). This case is debated in the legal tradition in three subsidiary scenarios that relate to *ḥadd* lapsing, retraction of confession and repentance.

1.4.1 Conflicts of Rights (*la yajūz istifā' mā yakūn fihī tafwīt li ḥaqq Allāh*)

Among Sunnī jurists, the Ḥanafīs argued that God's rights in *ḥadd* punishments ought to be waived for a higher principle, to preserve a higher

right of God. When God's rights are in conflict, Sunnī jurists debated whether the right consisting in *ḥadd* punishment was to be satisfied or abrogated. For instance, suppose that a *ḥadd* offence was committed by a male refuge seeker (*musta'min*)¹⁸² while he is under Islamic protection.¹⁸³ The Ḥanafis held that the basis rule for such a case is that if God's right conflicts with a higher right of His (in this case, to protect the refuge seeker) the latter negates the former. For instance, the Ḥanafis argued that if a Muslim or *dhimmī* man committed illegal sexual intercourse (*zinā*) with a female refuge seeker (*musta'mina*) the punishment applied only to the Muslim or to the *dhimmī* and the *musta'mina* was not to be punished.¹⁸⁴

(There is also the case of a female Muslim who commits illegal sexual intercourse with a *musta'min*. In this scenario, the Ḥanafis strangely waived the punishment for both of them, the Muslim woman and the *musta'min*. Al-Sarakhsī justified his position on this particular scenario by arguing that “*ḥadd* is waived in this case because she [the female Muslim] allowed herself to commit *zinā* with someone whose offence is not counted as a *ḥadd* crime, as in the case of an underage person or a madman (*lā ḥadd ‘alayhā li-annahā mā kānat nafsuḥā min fā’il lā yalzam al-ḥadd bi-fi’lihi fa-huwa ka-l-tamkīn minā*

¹⁸² Since it is impossible to translate the term *musta'min* with one English word that conveys the equivalent meaning, I have opted to use the Arabic term throughout.

¹⁸³ I would like to indicate that there has not been any serious research that tackles the issue of the *musta'min* and their rights under the Islamic criminal law especially in relation to how this particular law may apply to the non-Muslims' immunity seekers as well as tourists in the Muslim countries where the law of Islamic *ḥadd* is currently implemented.

¹⁸⁴ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 64.

al-ṣabī aw al-majnūn)”.¹⁸⁵ The Ḥanafīs regarded the *mustaʿmin* who committed *zinā* with a Muslim woman as having no liability, just like an immature or insane person.

Ḥanafīs justified their position by arguing that “the *ḥadd* punishment does not apply to the *mustaʿmin* for the reason that his safety ought to be protected (*la yuqām ʿalayhi al-ḥadd li-wujūb tabligh maʿmanihi*)”.¹⁸⁶ This is because “to guard the safety of the *mustaʿmin* ... is a duty and a right of God”. Therefore, by inflicting the punishments on them God’s right will not be fulfilled or achieved. The rule, according to the Ḥanafīs, is that the judge must not apply the *ḥadd* punishment in the case of *mustaʿmin* committing *ḥadd* offence because the latter is under the Islamic protection, that is, the privilege given to the *mustaʿmin* in the Islam (*la yajūz istifāʾ mā yakūn fihī tafwīt mā huwa ḥaqq li-Allāh khālīs*).¹⁸⁷

However, within the Ḥanafī school there was a measure of disagreement about the criminal liability of the *mustaʿmin*. For example, the Ḥanafīs debated this point in the context of banditry. Abu Ḥanīfa’s pupil Abū Yusūf held that the banditry punishment applies to both the *dhimmī* and the *mustaʿmin* and that both are liable for their banditry crimes.¹⁸⁸ Some of the later Ḥanafīs followed his opinion. In reference to the offence of theft committed by the *mustaʿmin*, Ibn Nujaym argued that “it is a *ḥadd* offence

¹⁸⁵ Ibid, p. 64.

¹⁸⁶ Al-Sarakhsī, *Al-Mabsūt*, vol. 9, p. 64; Ibn al-Humām, *Fath al-qadīr*, vol. 5, pp. 63-4.

¹⁸⁷ Al-Sarakhsī, *Al-Mabsūt*, vol. 9, pp. 63-4.

¹⁸⁸ Ibid., vol. 9, p.157.

and it ought to be implemented (*wa-lanā annahu ḥadd yuṭālab bihi*).¹⁸⁹ By contrast, Abū Ḥanīfa and Muḥammad al-Shaybānī held that all *ḥadd* offences, even though they are regarded as God's right, are not applied to the refugee seeker (*al-musta'min lā tuqām 'alayhi al-ḥadd allatī hiya li-Allāh khālīṣa ka-ḥadd al-zinā wa-l-sariqa wa-qat' al-ṭarīq*).¹⁹⁰

Against the Ḥanafī followers of Abū Ḥanīfa and al-Shaybānī, the Shāfi'īs, Ḥanbalīs and Mālikīs held that the refugee seeker is liable for his actions including *ḥadd* offences. Al-Shāfi'ī rejected the Ḥanafīs' special treatment of the *musta'min* and responded by saying: "the *ḥadd* applies to the male and female *musta'min* similar to the *dhimmī* because as long as they are in our land they are held accountable for their *ḥadd* offences, except for the offence of drinking alcohol."¹⁹¹ The Shāfi'īs held that, as long as the refugee seeker is liable to retaliation (*qiṣāṣ*) and *qadhf*, then the *musta'min* is liable for committing other *ḥadd* offences as well. Otherwise, if the punishment of *ḥadd* is waived Muslims in general are weakened (*al-istikhfāf bi-l-Muslimīn*).¹⁹² The Shāfi'īs further argued that *musta'mins* are not given the sought-for protection in order that this results in disregard for the Muslims. The *ḥadd* for drinking alcohol is not included, as this is not forbidden in the *musta'mins*' faith.

The Ḥanbalīs seconded the Shāfi'īs' position and rejected the avoidance of *ḥadd* punishment when committed by the *musta'min*. They

¹⁸⁹ Ibn Nujaym, *Al-Baḥr al-rā'iq*, vol. 9, p. 112.

¹⁹⁰ Ibid., p. 63.

¹⁹¹ Al-Sarakhsī, *Al-Mabsūt*, vol. 9, pp. 63, 64.

¹⁹² Al-Shāfi'ī, *Al-Umm*, vol. 6, p. 199.

argued that the Islamic rules and legislation were valid for the *musta'min*: “If a *ḥarbī* enters our territory as a *musta'min* and then if he commits theft, he must suffer amputation... for the norms of Islam apply to him (*al-ḥarbī idhā dakhala ilaynā musta'minan fa-saraq fa-innahu yuqṭa' [...] li'anna aḥkām al-islām jāriya 'alayhi*)”.¹⁹³

In sum, the jurists controversially discussed the principle that a right of God dismisses another of His right. In the case of *isti'mān*, only (some of) the Ḥanafis were ready to prioritize it over the right of God for *ḥadd* punishment, but the debate shows that the *fiqh* tradition offers avenues to weigh the pros and cons of *ḥadd* punishments and, in some cases, to dismiss them for ‘the higher interest’.

1.4.2 Dismissing God’s rights on the basis of doubt (*shubha*)

According to Rowson, *shubha* (pl. *shubuhāt*) literally means “resemblance”. It is a term that developed two distinct technical meanings. The first meaning refers to the term in theology and philosophy, where it indicates a false or specious argument that resembles a valid one. The second meaning, as Rowson explains, is the technical legal term: “legal doubt”, or “ambiguity”. *Shubha* here concerns, for example, a licit act that resembles an illicit one. *Shubha* in this sense is relevant primarily to the law of *ḥadd*.¹⁹⁴

All Sunnī schools of law unanimously agreed on waiving *ḥadd* punishments in cases of doubts. In fact, the avoidance of *ḥadd* punishments in

¹⁹³ Ibn Qudāma, *Al-Mughnī*, vol. 9, pp. 111-2.

¹⁹⁴ E.K. Rowson, “Shubha”, *Encyclopaedia of Islam, Second Edition*, vol. ix, p. 492.

cases of doubt (*shubha*) is known as one of the “Islamic legal maxims”, which Intisar A. Rabb has labeled as “substantive canons of construction”. Rabb explains that according to the “*ḥadd* maxim ... judges are to avoid imposing *ḥadd* and other sanctions when beset by doubts as to the scope of the law or the sufficiency of the evidence (*idraʿū l-ḥadd bi-l-shubuhāt*).” She argues that jurists of all periods reference this maxim widely.¹⁹⁵

However, jurists debated the causes and conditions of legal doubt and therefore their legal implications for the implementation of *ḥadd* punishments. In the following section, I discuss three subsidiary scenarios of doubt cases found in the writings of Muslim Sunnī jurists.

1.4.2.1 *Ḥadd lapsing (tasquṭ al-ḥadd bi al-taqādum)*

One of the general principles about avoiding the *ḥadd* punishment in cases of doubt is the lapsing of the *ḥadd* offence. The Ḥanafī jurist Ibn Nujaym stated that the *ḥadd* punishments, which are rights of God, lapse when the crime is not brought before the judge at the time when it occurs

¹⁹⁵ See Rabb, “Islamic Legal Maxims as Substantive Canons of Construction”, pp. 63-125. Fierro has explored the origin and diffusion of the idea that *shubha* invalidates *ḥadd* punishment, and how it was transformed into a Prophetic saying that was employed mainly by the Ḥanafīs and Mālikīs but rejected by the Ḥanbalīs and the Zāhiri Ibn Ḥazm. Fierro’s main argument about the historical development of the Prophetic saying of avoiding the *ḥadd* punishment in cases of doubt is that there was a tension between two equally compelling needs in the early Islamic period. On the one hand, the desire to avoid as much as possible imposition of the severe *ḥadd* punishments; on the other hand, the fact that such avoidance usually played in favour of the rich and the powerful. Cf. Fierro, “*Idraʿū l-ḥadd bi-l-shubuhāt*: when lawful violence meets doubt”.

(*tabṭul al-ḥadd bi-l-taqādum*).¹⁹⁶ An example presented in the Ḥanafī writings is where a group of bandits is brought before the judge. The judge thinks that the bandits are to compensate for the stolen property and he allows the heirs to claim the compensation, but does not condemn the bandits to suffer additional *ḥadd* punishment. Then, after some time, the bandits are brought before a different judge. This judge, the Ḥanafīs argued, is not to inflict the *ḥadd* punishments. This is because the crime lapses when it is not notified to the judge at the time it occurs (*li-taqādum al-‘ahd wa-in‘idām al-khaṣm*).¹⁹⁷ Al-Sarakhsī categorized this scenario under *shubha* for the reason that in the case where there is a lapse of *ḥadd* offence there is a possibility of having the culprit repented from his offence. Al-Sarakhsī espoused a narration attributed to the Companion ‘Alī where he is reported to have dismissed the *ḥadd* punishment of a bandit named: Ḥārith bin Yazīd who is reported to have committed *ḥirāba* and his offence was considered as a lapsed crime because the latter is believed to have travelled to Baṣra without being prosecuted for his *ḥirāba* offence. According to al Sarakhsī, ‘Alī wrote a letter to the ruler of Baṣra asking the latter to dismiss the *ḥadd* punishment of Ḥārith bin Yazīd.¹⁹⁸

14.2.2 Retraction of confession (*al-rujū‘ ‘an al-‘iqrār*)

Sunnī jurists discussed the effect of confessions and subsequent retractions on the culprits’ liability for their *ḥadd* offences. The majority of

¹⁹⁶ Ibn Nujaym, *al-Baḥr al-rā‘iq*, vol. 5, p. 23.

¹⁹⁷ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 239.

¹⁹⁸ Ibid., p. 240.

Sunnī jurists held that confession (*iqrār*) is the only evidence against the culprit that can be retracted. They debated, however, whether it makes a difference whether the confession concerns a crime that affects public interests or private interests. For instance, in the jurists' debate about confession in a *zinā* offence, the retraction of a *zinā* confession voids *ḥadd* liability. According to the four Sunnī schools of laws, *zinā* is a pure right of God (*ḥaqq Allāh*), but when it is initiated to the judge only on the basis of a voluntary confession then legal doubt (*shubha*) arises once the confession is retracted. Jurists requested that no one can oppose the accused party in this case; the presence of ambiguity causes the *ḥadd* punishment to become void.¹⁹⁹

The juristic debate on the issue of ambiguity and its legal implications is important if we want to understand the justifications behind either the implementation or the avoidance of *ḥadd* punishments. The jurists' debate about avoiding the *ḥadd* punishment in cases of doubt rests on a *ḥadīth* according to which the Prophet urged his followers to “avoid applying the *ḥadd* where there is ambiguity (*idraʿū al-ḥadd bi l-shubuhāt*).” Obviously, Sunnī jurists relied on this particular Prophetic narration in their legal debate and embraced it as a general principle. This led them to be extremely cautious with regard to the implementation of *ḥadd* punishment: the judge *must* avoid the *ḥadd* punishments where ambiguity exists.²⁰⁰

¹⁹⁹ Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 12.

²⁰⁰ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 119; Ibn al-Humām, *Fath al-qadīr*, vol. 5, p. 237; Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 186.

Sunnī jurists agreed that the retraction is valid even though it abrogates a right of God. This applies to all *ḥadd* offences except *qadhf*.²⁰¹ In cases of infringement upon pure rights of God (in particular in cases of illegal sexual intercourse, apostasy and consuming alcohol), retraction of confessions is permitted.²⁰² Confession to any of these acts is considered sufficient to initiate prosecution. Since these crimes infringe upon pure rights of God, the confessor is allowed to retract his confession and subsequently negate his liability on the basis of *shubha*.

Interestingly, according to the majority of the four Sunnī schools of laws, the imām/ruler is encouraged to ask the culprit to retract his confession. Ibn Qudāma stated that “there is no harm in asking the thief to retract his confession, and this is the opinion of the majority of jurists (*la ba’sa bi-talqīn al-sāriq li-yarja’a ‘an iqrārihi wa-hādhā qawl ‘āmmat al-fuqahā’*)”.²⁰³ The Ḥanafīs shared a similar position to the Ḥanbalīs, holding that “the ruler (*imām*) is recommended to avoid the *ḥadd* punishment and is recommended to ask the confessor to retract his confession (*al-imām mandūb ilā al-iḥtiyāl li-dar’ al-ḥadd wa-talqīn al-muqirr al-rujū’*)”.²⁰⁴

The general *fiqh* rule regarding confession of the *ḥadd* offence is that it must be upheld by the culprit until the punishment is inflicted. This general

²⁰¹ Ibn Qudāma, *Al-Mughnī*, vol. 9, pp. 64, 119.

²⁰² Al-Qarāfī, *Al-Dhakhīra*, vol. 9, p. 350: *wa yuqbal al-rujū’ fī jamī’ ḥuqūq Allāh mina al-sariqa wa-shurb al-khamr w-al-ḥirāba idhā atā bi-‘udhr wa-in lam ya’ti bihi yukhtalaf fīhi: in ijtama’ ḥaqq Allāh wa ḥaqq al-ādami fī al-iqrār lazimahu ḥaqq al-ādami wa-in atā fī ḥaqq Allāh bi-‘udhr qubila, wa-illā, ḥudd.*

²⁰³ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 120.

²⁰⁴ Al-Sarakhsī, *Al-Mabsūt*, vol. 9, p. 168.

rule rests on the story of one Mā'iz b. Mālik, a contemporary of the Prophet, who confessed four times that he had committed unlawful intercourse and refused to retract his confession. While stoning was being inflicted on him he tried to escape but failed. The Prophet is reported to have said, “Have you not left him [time] to repent and for God to forgive him (*a-lā taraktumūhu yatūbu fa-yatūbu Allāh ‘alayhi*)?” Ibn Qudāma commented on this *ḥadīth*: “This example [of Mā'iz] is the clearest evidence that it is acceptable for a confessor to retract his confession, because his confession is a doubt and the *ḥadd* punishment are averted by strength of legal doubt (*fa-fī hādhā awḍaḥ al-dalā'il annahu yuqbal rujū'uhu, wa li-anna rujū'ahu shubha w-al-ḥudūd tudra' bi-l-shubhāt*)”.²⁰⁵

As for instances of mixed rights, that is, cases in which both a right of God and a personal right are at stake, the situation is somewhat more complicated. In the *ḥadd* punishment for theft, amputation vindicates a right of God, and compensation satisfies a private right. Jurists generally agreed that the punishment of amputation becomes void in case of retraction of confession. The Ḥanbalīs held that, since amputation is a distinct and distinguishable punishment, it must become void because it reflects a right of God. Ibn Qudāma noted that the Prophet offered retraction of confession for *ḥadd* offences on different occasions, for instance, the Prophet offered

²⁰⁵ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 64.

retraction to a thief when saying to him “I do not think that you committed *sariqa* (*mā akhāluka saraqta*)”.²⁰⁶

The Ḥanbalīs insisted on considering the theft punishment to be a right of God; theft can be proven by a voluntary confession and, therefore, can be retracted like the offence of *zinā*.²⁰⁷ The Ḥanbalīs regarded the retraction as legal doubt (*shubha*), and thus “*ḥadd* is averted on the strength of doubts”: amputation in such a case is invalid (*yabṭul*).²⁰⁸ This argument, according to the Ḥanbalīs, is consistently applied to all *ḥadd* offences, except the offence of *qadhf*. Ḥanafī jurists held that if the confessor retracts his confession, whether before the infliction of the *ḥadd* or during the infliction of the punishment, is to be set free (*in raja‘a ‘an iqrārih qabla al-ḥadd aw fi wasaṭihi khalā sabīluh*).²⁰⁹ Ibn Nujaym argued that the retraction of the confession, especially when it is not falsified, constitutes *shubha* because the retraction could be true like the confession made to the ruler.

But what about the private right that is injured in theft offences? Suppose a case of theft is proved only on the basis of confession. What happens if the thief recants? In this case, the accused’s liability to compensate the victim remains. The Shāfi‘is and Ḥanbalīs consistently held that because it is intimately associated with an individual right that is not affected by a

²⁰⁶ Ibid., p. 119.

²⁰⁷ Ibid., p. 119: *li-annahu ḥadd Allāh thabuta bi-l-i‘tirāf faqubila rujū‘uhu ka-ḥadd al-zinā*.

²⁰⁸ Ibid., p. 119.

²⁰⁹ Ibn Nujaym, *Al-Baḥr al-rā‘iq*, vol. 5, p. 12.

retraction, corporal liability for theft remains.²¹⁰ Thus, retraction of confession only negates the punishment due as the right belonging to God; however, its effect to negate the individual's right is a matter of contention among Sunnī jurists.

1.4.2.3 Repentance (*tawba*)

Repentance after committing *ḥadd* offences was vehemently debated among Sunnī jurists. Jurists held two opposing positions about the effectiveness of repentance in negating the punishment, especially when repentance occurs *after* the *ḥadd* offence is brought before the judiciary. The Ḥanbalī Ibn Qudāma and the Shāfiʿī al-Shīrāzī explained that in the case of confession after committing the *ḥadd* crime there are two basic views. The first one, supported by the Ḥanbalīs, is that the *ḥadd* punishment becomes void on the basis of the Qurʾān 5:38²¹¹ and the Prophetic *ḥadīth* that “whoever repents from the sin is like someone who never sinned (*al-tāʾib min al-dhanb ka-man lā dhanba lahu*).”²¹² Ibn Qudāma concludes from this particular *ḥadīth* that “who does not sin should not to be punished”.²¹³ Ḥanbalīs regarded all *ḥadd* punishments that are viewed as God's right to become void whenever repentance occurs.

²¹⁰ Al-Nawawī, *Rawḍat al-tālibīn*, vol. 7, p. 355, Ibn Qudāma, *Al-Mughnī*, vol. 9, pp. 119-120.

²¹¹ “And (as for) the male thief and the female thief, cut off (from the wrist joint) their (right) hands as a recompense for that which they committed, a punishment by way of example from Allah. And Allah is all-powerful, all-wise.”

²¹² Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 130; Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 453.

²¹³ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 130.

The Ḥanafīs, Mālikīs and one of the Shāfi‘īs held that *ḥadd* punishment does *not* become void because of repentance, except in cases of *ḥirāba*. Their position about repentance rests on the Qurʾānic verses of *zinā* and *sariqa*, where repentance is not explicitly mentioned. They also adduced Prophetic traditions according to which the Prophet inflicted the punishments, even where repentance had occurred, as in the cases of Mā‘īz and al-Ghāmidiyya. Even though Mā‘īz and al-Ghāmidiyya confessed their crimes and showed repentance, the Prophet nevertheless carried out the stoning punishment. The Ḥanafī Ibn Nujaym argued that “if the *ḥadd* offence is proven to the imām the *ḥadd* punishment must be inflicted and repentance does not negate the punishment.”²¹⁴ The Ḥanafīs’ position on repentance is that repentance serves as an act of atonement for the culprit and obviates punishment in the hereafter (*al-tawba lā tusqītu al-ḥadd fī al-dunyā*).²¹⁵ I will return to the concept of *kaffāra* (expiation) in ch. 3 of this thesis.

²¹⁴ Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 5.

²¹⁵ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 186, Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 116.

1.5 Conclusion

In conclusion, Sunnī jurists attempted to rationalise the law, but they restricted their ability to do so by allowing reason to operate only within the limits of revelation, that is, within the textual framework of the Qurʾān and the sound Sunnah.²¹⁶ In order for them to argue that God’s intention could be known through His revelation to humankind, they had to set up general and broad principles of interpretation, and to be willing to speculate about the underlying purposes of the law even when explicit textual support could not be adduced from scripture directly. Only this allowed them the flexibility required to apply their reasoning to legal questions of all kinds. As Coulson observes, “[e]quity and the public interest were ... seen as the purpose of Allāh which it was the task of jurisprudence to implement in the absence of any more specific indication in the Qur’an or the Sunna.”²¹⁷

This questioning attitude of the jurists, their willingness to go beyond the narrow textual framework set by the Islamic revelation, indicates that they did not let themselves be impeded by the notion that the *ḥadd* punishments were ‘simply’ the “rights of God”, to be implemented at all cost. As this chapter has shown, their deliberations are far more variegated and nuanced. In fact, the idea of “God’s rights” at times appears rhetorical. The

²¹⁶ Cf. Bernard Weiss, *The Spirit of Islamic Law* (Athens: Georgia University Press, 1998), pp. 24-37.

²¹⁷ Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago-London: The University of Chicago Press, 1969), p. 7.

jurists did not consider juristic reasoning about God's ulterior purpose behind His legislation, which they believed had been given to humankind in order to preserve the five essentials, particularly difficult or problematic. They all, with few exceptions, agreed on these basic assumptions. What was problematic for Muslim jurists was how to determine, balance and justify the interests at stake, especially when those interests were in conflict. This is clear throughout the juristic debate regarding *ḥadd* punishments.

For instance, when the jurists debated whether the theft punishment satisfies a right of God or an individual right, it was the balancing of the interests that posed a challenge, and then the ways in which the punishment should satisfy the violated right. As Emon remarks, legal reasoning in the law of *ḥadd* “proved particularly difficult when the public interest conflicted with the needs of private parties.”²¹⁸ Emon views the jurists' distinction between the right of God and the private right of the individual as an interpretive mechanism to frame their naturalistic assumptions and apply them in legal analysis to create and distribute rights, duties, and public commitments.²¹⁹

In this chapter, I set out with the intention to trace legal debates about *ḥadd* punishments conceived as a right that belongs to God. Except in the *qadhf* offence, the jurists sharply distinguished between God's rights and the individual's interests, and it appears that they applied this distinction in order to establish legal rules that reflected their (pre-)understanding of the

²¹⁸ Emon, “Ḥuqūq Allāh and Ḥuqūq al-ʿIbād”, p. 327.

²¹⁹ Ibid., p. 225.

Islamic values of dignity and honour, both with regard to the significance of such values for individuals and for society as a whole.²²⁰ This finding broadly confirms Emon's view that *fiqh* discourse on *ḥadd* is characterized by a remarkable degree of intellectual autonomy. However, I argued that Muslim jurists labeled *ḥudud* offences and their punishments as God's rights because they did not want to allow a flexible law that is accessible for human to mitigate or dismiss without a juristic reference.²²¹

In sum, the jurists' distinction between the right of God and the individual's right allowed them to ensure that the Shari'ah as a rule of law upholds and, when necessary, balances both society's needs (the common good which is presumed to represent God's right) and private interests such as the honour and dignity of the individual. The Sunnī jurists insisted on a certain immutability of *ḥadd* punishments as norms that are "divinely ordained" (*muqaddar*), especially once the crime was brought before the judicial authorities. However, this did not prevent them from developing a wide arsenal of rules and exceptions that could often help to circumvent the implementation of the *ḥadd* punishments.

²²⁰ Ibid., p. 358.

²²¹ Emon has argued against my argument where he indicates that the jurists embraced values and assumptions that echo the modern Western notion of 'natural rights'. As he writes, the jurists established a "natural rights regime", they "did not resort to scriptural text to 'find' or 'discover' rules". Instead, writes Emon, "they relied on implicit naturalistic presumptions about human nature and the social good, formed in terms of the *ḥuqūq* Allāh/*ḥuqūq al-ʿibād* heuristic, to justify a particular right and its distribution", Ibid. 382

Chapter 2: Ḥadd punishments as general prevention (*zajr*) and individual prevention (*radʿ*)

2.1 Introduction

In the preceding chapter I discussed the jurists' justification of *ḥadd* norms and the punishments associated with them as the right belonging to God (*ḥaqq Allāh*), and I elaborated on a number of examples from within the jurists' debate about the conflicts of rights between the rights of God and those of the individual. I argued that, despite the fact that the jurists treated *ḥadd* punishments as the immutable law of God the jurists made certain exceptions where *ḥadd* punishments become inoperative. In chapter two, I examined the justification of *ḥadd* punishments as deterrents, that is, legal actions aimed to deter generally and individually.

Obviously, *ḥadd* offences and the capital and corporal punishments associated with them occupy a central place in the Islamic legal tradition. Classical jurists were responsible for establishing the final form of rules about the implementations of *ḥadd* punishments (*iqāmat l-ḥudūd*). Based on the Qurʾān and the Prophetic tradition (*sunnah*), jurists defined *ḥadd* offences and regarded their punishments as fixed, immutable and eternally mandatory (*ʿuqūbāt muqaddara*). However, the Qurʾān remains equivocal about the precise definition of *ḥadd* offences and the ways in which the punishments should be inflicted. For this reason, a unanimous recourse to the Prophetic

and *ṣaḥāba* traditions was the foundational source of law for classical jurists to establish a firm set of rules about ḥadd punishments. Therefore, classical jurists played a major role in shaping the final form of ḥadd laws and their punitive practices. For example, they defined ḥadd offences as entirely or predominantly the violation of God's claim (*ḥaqq Allāh*). This was sometimes equated with violation of the public interest (*al-maṣlaḥa l-ʿāmma*). Undoubtedly, this inevitably led classical jurists to treat ḥadd punishments as the fixed (*al-thābit*) law of God.

This chapter aims, first, to examine one of the main juristic justifications of ḥadd Allāh, that is, general and individual prevention (*zajr* and *radʿ*). I will examine the justification of ḥadd punishments as general prevention by paying particular attention to the punishments of stoning (*rajm*) and crucifixion (*ṣalb*). As for individual prevention, the punishments of flogging (*jald*), amputating (*qaṭʿ*) and banishment (*naḥy*) will be analysed and used as illustration. Secondly, I propose two case studies about ḥadd punishments as disputed in the *fiqh* tradition because these were thought by some jurists to be ineffective. Finally, I propose a brief discussion related to the uncertainty of the justification of ḥadd punishments as effectuating general and individual prevention, and this discussion will then be further explored in chapter three, that is, when I will turn to the issue of whether to suffer a ḥadd punishment is an act of expiation (*kaffāra*).

2.2 *Fiqh* debates about ḥadd punishments as general prevention (*zajr*) and individual prevention (*radʿ*)

In this section, I examine the jurists' concepts of *zajr* and *rad*^c, concepts which were proposed in the tradition of jurisprudence (*fiqh*) and were later deployed by Muslims jurists to justify *ḥadd* punishments, particularly in view of the severity of these punishments. According to the Sunnī legal tradition, *ḥadd* punishments were perceived as to generally and individually deter Muslims from committing *ḥadd* offences. For example, the Mālikī jurist al-Qarāfī held that deterrence is a basic Islamic rule of law (*al-zawājir min qawā'id al-shar'*).²²² It is important to stress that the juristic concepts of *zajr* and *rad*^c as proposed in their classical writings are not systematically distinct from each other and that they are almost synonymous.

In this section I refer to the concept *zajr* in relation to instances in the legal discourse where classical jurists justified *ḥadd* punishments by claiming that they prevent the general public (*al-ʿāmma*) from committing the same crime. As for the concept of *rad*^c, I refer to it where *ḥadd* punishments are justified as to prevent the individual (*rad*^c) from re-committing the offence. I examine the jurists' justification of *ḥadd* punishments as deterrents by critically analysing a number of *ḥadd* offences and by discussing the implications of their punishments in the *fiqh* tradition. Classical jurists tended to argue that capital punishments deter the general public from committing "obscene" crimes (*fawāḥish*), and that corporal punishments prevent and deter the offenders from re-committing a similar offence. I also examine two

²²² Al-Qarāfī, *Al-Dhakhira fī furū' al-Mālikiyya*, vol. 12, p. 260.

case studies found in the *fiqh* writings where jurists discuss the perceived ineffectiveness of *ḥadd* punishments as deterrent tools.

2.2.1 General prevention (*zajr*)

Semantically, *zajr* denotes forced prevention and suppression (of customs, abuse, crimes). The adjective of *zajr* is *zājir* which, if taken as a noun, means handicap, impediment; its plural is *zawājir* which encompasses the meaning of restriction and limitation.²²³ As to the concept of *radʿ*, the dictionary defines this as “to keep, prevent from”. The adjective of *radʿ* is *rādiʿ* (pl. *rawādiʿ*) which, if taken as a noun, means deterrent, impediment, obstacle, handicap, restriction, and limitation.²²⁴ In the next section, we will also come across the term *tashhīr* in the juristic discussion of the procedures of *ḥadd* implementations. *Tashhīr* can be translated as the act of “making a person becoming well known, notorious, and of ill repute”.²²⁵

Ḥadd offences and *ḥadd* punishments are defined in the jurists’ manuals as the limits of God (*ḥudūd Allāh*), and *ḥadd* punishments are portrayed and justified as to generally prevent Muslims from committing any of the offences and, more generally, of all obscene acts (*fawāḥish*) forbidden in revelation.²²⁶ According to all Sunnī schools of law, the principle purpose of the institution of *ḥadd* norms (*tashrīʿ l-ḥudūd*) and of *ḥadd* punishments is

²²³ Wehr, *Arabic English Dictionary of Modern Written Arabic*, p. 373.

²²⁴ Ibid., p. 335.

²²⁵ Ibid., p. 490.

²²⁶ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, pp. 41-42; Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 4; Ibn al-Humām, *Fatḥ al-qadīr*, vol. 5, pp. 312, 325.

to deter (*zajr*) the public from acts that are potentially harmful to humanity (*shurīʿat li-maṣlaḥat al-ʿibād*).²²⁷ Therefore, in pursuance of this objective, classical jurists argued that the fixed punishments of *ḥudūd* Allāh must be inflicted publicly, to achieve a high degree of publicity. There is no single occasion where classical jurists do not present *ḥadd* punishments and their deterrent effect (*zajr*) as the main underlying purpose (*ratio legis*) behind Islamic criminal law, not only of *ḥudūd*, but also of *qisās* and *taʿzīr*. This is because, according to Muslim jurists, the threat of punishment in the hereafter does not sufficiently and effectively deter people from committing forbidden offences. Thus, *ḥadd* punishments are conceived as a vital necessity to balance actions in this world.

Sunnī jurists proposed in their introductions about *ḥadd* punishments the definition of *zajr*, which they developed and considered as the *ratio legis* (*ʿilla*) behind the legislation of *ḥadd*. It can be observed that *zajr* as defined in the jurists' writings entails general and individual prevention. Again, let it be stressed that there is a manifest overlap between *zajr* and *radʿ* in the juristic presentation of the justifications of *ḥadd* punishments. A number of classical jurists proposed the dual combination of *ḥadd* as *zajr* and *radʿ*. According to Ibn al-Humām, “*ḥadd* punishments are to prevent and to deter” (*al-ḥudūd mawānīʿ qabl l-fīʿl zawājir baʿdahu*).²²⁸

²²⁷ Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 4

²²⁸ Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 4; Al-Kāndahlawī, *Awjāz al-masālik ilā Muwaṭṭaʿ Mālik*, vol. 15, p. 225.

In my view, jurists from early to classical times developed a narrow concept of *ḥadd* punishments and their implications for two reasons: on the one hand, they wanted to circumscribe the applicability of *ḥadd* punishments; on the other hand, they allowed them only in as much as they served to generally deter people from committing forbidden offences. Parallel to this process, the legal concept of *tashhīr* (ignominious, parading)²²⁹ was first introduced and later developed by jurists to justify and describe the purposes behind legal punishment more generally speaking.²³⁰ *Tashhīr*, according to *fiqh* tradition, aims to publicly destroy the inviolability (*ḥurma*) and dignity (*karāma*) of the culprit. The Ḥanafis extensively discussed the concept of *tashhīr* and insisted on its vital role in deterring the Muslim public from committing forbidden offences. As the influential late-classical Ḥanafī Ibn al-Humām put it, “the principle of *ḥadd* law is to make someone well-known/notorious (*al-ḥadd muṭlaqan mabnī ‘ala l-tashhīr*), in order to achieve public deterrence (*zajran li-l-‘āmma*)”²³¹. Both Ibn al-Humām and Ibn Nujaym argued that the punishment for illegal sexual intercourse (*ḥadd al-zinā*), that is, stoning (*rajm*), is based on the principle of *tashhīr*; however, *tashhīr* is emphasised more if the culprit is male.²³² Accordingly, the practice of

²²⁹ Lange remarks on the concept of *tashhīr* stating that: “*Tashhīr* was a multidimensional and multifunctional punishment that deserves to be recognised as being of central importance to the development of Islamic punitive practices in premodern times”. Cf. Lange, *Justice, Punishment and the Medieval Imagination*, pp. 226-243.

²³⁰ Ibn al-Humām, *Fatḥ al-qadīr*, vol. 5, p. 222.

²³¹ Ibn al-Humām, *Fatḥ al-qadīr*, vol. 5, p. 220; Ibn Nujaym, *al-Baḥr al-rāʾiq*, vol. 5, p. 16.

²³² Ibn al-Humām, *Fatḥ al-qadīr*, 5, p. 222; Ibn Nujaym, *al-Baḥr al-rāʾiq*, vol. 5, p. 16.

ignominious punishment in Islamic law aims, first, to deter the general public (*zajr*) from committing *ḥadd* offences. Secondly, it aims to humiliate and disgrace the culprit.²³³ The characteristic of individual prevention (*radʿ*) in capital punishments, that is, stoning and crucifixion, is less emphasised in the juristic discussion. In other words, the humiliation and disgrace of the culprit are not meant to deter the culprit and this is because the latter is put to death by the capital punishment, which means that he will not have the chance to be deterred from committing the same offence again.

The Mālikī jurist Al-Qarāfī held that all *ḥadd* punishments must be implemented equally in public (*al-ḥudūd kulluhā tuʿlanu wa-l-nās fihā kulluhā sawāʿ*).²³⁴ As a further illustration of this point, I have examined examples of capital punishments where general deterrence is presumed and where the aspect of *tashhīr* is emphasized. The examples as presented in the *fiqh* tradition are the punishments of stoning (*rajm*) and crucifixion (*ṣalb*).

2.2.1.1 Stoning (*rajm*)

The jurists' understanding of the implementations of *ḥadd* punishments (*iqāmat l-ḥudūd*) is manifest in their arguments where *ḥadd* punishment is based on inflicting the *ḥadd* punishment as publicly as possible (*mabnā l-ḥudūd ʿalā l-tashhīr*). According to the Sunnī schools of law, it is the consensus of Muslim jurists that stoning (*rajm*) is the Sunnah of the Prophet Muḥammad and that it is the practice of the community where the companions of the

²³³ Al-Nawawī, *Rawḍat al-tālibīn*, vol. 7, p. 316.

²³⁴ Al-Qarāfī, *Al-Dhakhīra*, vol. 12, p. 87.

Prophet were reported to have stoned offenders of *zinā* offences. As the *fiqh* tradition indicates, the punishment of *zinā* must in all cases follow the example of the stoning which took place during the lifetime of the Prophet Muḥammad. For instance, the Ḥanbalī jurist Ibn Qudāma described the process of inflicting the punishment as follows: “if the offence of *zinā* is committed by a free man, then he is to stand while the stones are being thrown over him. This is the procedure whether the offence was proven either by four witnesses or by confession.”²³⁵

This injunction, that the male culprit is to stand, underscores the public character of the punishment: that jurists thus made sure that even spectators on the fringe would witness the punishment inflicted.

Furthermore, jurists argued that it is essentially from the Sunnah practice that the Muslim public witnesses the punishment in great numbers. In the Qurʾān one finds the principle: “Let a group of believers witness their punishment” (Q 24:2). But this is not all: the public must not only witness but also take an active role in participating in the actual process of stoning. According to a Prophetic tradition, if four eyewitnesses confirmed the *zinā* offence, the crowd must surround the adulterer or adulteress and initiate the stoning. If the offence is proven by confession, then the ruler (*ḥākim*) is to

²³⁵ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 40.

initiate the stoning process, and then the Muslim public is instructed to continue stoning the culprit until she/he dies.²³⁶

The Shāfi'is, for example al-Shīrāzī, held that it is not compulsory for the imām to attend or participate in the stoning process because the Prophet was never reported to have attended or participated in this process.²³⁷ One can observe that, in the jurists' writings about the implementation of *ḥadd* punishment, the process of stoning is discussed in great detail. Furthermore, Muslim classical jurists were even specific in their description of the type of stones that should be used, as well as the ways in which the stones should be thrown throughout the process of stoning. Thus, several Sunnī jurists state that

stoning to death is administered by a crowd, throwing stones at the adulterer or adulteress with intentionally aiming to ultimately kill him or her. The stones must not be too small or too large: if they are too small it may take too long to kill the condemned and if they are too large, he or she may die too soon. The right size is that of a stone that fills a hand.²³⁸

Sunnī jurists agreed that the stoning punishment is intended to cause death (*l-rajm itlāf*).²³⁹ Thus the participants are recommended to directly aim at killing the culprit (*wa-yustaḥabbu li-kulli man rajama an yaqṣida qatlahu li-*

²³⁶ Ibid.

²³⁷ Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 388.

²³⁸ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 40; al-Ramlī, *Nihāyat Al-Muḥtāj*, vol. 7, p. 434; al-Qarāfī, *Al-Dhakhira*, vol. 12, p. 76.

²³⁹ Ibn al-Ḥumām, *Fath al-qadīr*, vol. 5, p. 213.

annahu al-maqṣūd).²⁴⁰ The Ḥanafī jurist Ibn al-Humām understood this recommendation as a means of “making it easy” (*taysīr*) for the culprit, that is, not to suffer for long.

Jurists proposed that *tashhīr* in stoning punishment functions as a caution message to the Muslim public. Thus, *tashhīr* was to function as an effective reminder to the Muslim society at large for their duties to keep distant from forbidden and obscene acts, that is, the *ḥadd* offences. Furthermore, jurists discussed the possibility that the adulterer may attempt to escape stoning. For instance, al-Shīrāzī held that if the offence was witnessed then the punishment must be carried out; however, if it was by confession then the adulterer must be let to escape the punishment.²⁴¹

2.2.1.2 Crucifixion (*ṣalb*)

The traditional interpretation of Q 5:33 is that it prescribes crucifixion as one of the four possible punishments for brigandage.²⁴² The majority of classical jurists held that the ruler (*imām*) has no right to waive crucifixion because its *tashhīr* character makes people reflect on the crime (*al-maqṣūd bihi al-ishhār li-ya‘tabira ghayruh*), thus teaching them to desist from it.²⁴³ The

²⁴⁰ Ibid., p. 215.

²⁴¹ Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 396.

²⁴² For more details about the background of crucifixion in early Islamic history see: Neal Robinson, “Crucifixion”, *Encyclopaedia of the Qurʾān*, vol. 1, p. 487b.

²⁴³ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, pp. 230-231; Khalīl Ibn Ishāq, *Mukhtaṣar Al-Shaykh Khalīl Ibn Ishāq ‘alā madhhab Mālik Ibn Anas* (Paris: Maṭba‘at al-Dawlah al-Jamhūriyyah, 1900), p.233; Ibn Qudāma, *Al-Mughnī*, vol. 12, p. 475.

Shāfi‘ī al-Baghawī argued that “crucifixion (*al-ṣalb*) happens so that people may learn a lesson (*li-l-i‘tibār*) and for *zajr*.”²⁴⁴

According to fiqh tradition, jurists from the early tradition disputed the exact way of crucifying the bandit. The Ḥanafīs, for instance, held that the bandit (*muḥārīb*) was to be left crucified for three days before being beheaded by sword and that this would be his only disgrace (*taḥqīq ma‘na al-khizy*). The crucifixion is viewed as an opportunity for the Muslim public to witness the punishment as a caution (*li-ya‘tabira bihi ghayruh*), especially for those who may themselves have the intention of pursuing such a grave offence.²⁴⁵ The Shāfi‘ī al-Ramlī is more specific about the place in which the crucifixion must take place, namely that it must be “where the incident of *ḥirāba* took place.”²⁴⁶ Al-Ramlī appears to reason that crucifixion would have its maximum deterring effect if carried out before the eyes of the community in whose midst brigandage had been committed. Al-Ramlī further argued that “the crucified bandit is to be held [on the cross] for a minimum period that deters people.”²⁴⁷ Similarly, Ibn Qudāma holds that the crucified bandit is to be left crucified for the period of the time which it takes to achieve *tashhīr* (*idhā ishtahara unzila*).²⁴⁸

The majority of Sunnī jurists agree that the crucifixion has to be before the execution, “so that public humiliation is really achieved” (*li-taḥqīq ma‘nā*

²⁴⁴ Al-Baghawī, *Al-Tahdhīb*, vol. 7, p. 402.

²⁴⁵ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 158.

²⁴⁶ Al-Ramlī, *Nihāyat Al-muḥtāj*, vol. 8, p. 6.

²⁴⁷ Ibid, p. 8.

²⁴⁸ Ibn Qudāma, *Al-Mughnī*, vol. 12, p. 479.

al-khizy fī ḥaqqih).²⁴⁹ There is a debate in the juristic writing about whether it is also allowable or recommended to crucify the bandit after he is executed. Apparently, this practice was prevalent in Arabia but was later found to be condemned in the Qurʾān and the Sunnah. According to the Prophetic tradition, the culprit's body after execution must be respected and treated in accordance with the teachings of Islam, which forbid mutilation (*muthla*).

2.2.2 When *ḥadd* punishments function both as general (*zajr*) and individual (*radʿ*) deterrents

It has been suggested that *ḥadd* punishments, as presented in the *fiqh* tradition, have the dual impact of both general and individual deterrence.²⁵⁰ According to the majority of Muslim jurists, all corporal punishments of the *ḥadd* type, for example, scourging, amputation, and banishment are delivered with the intent of having a deterrent effect on both the public and the culprits.²⁵¹ The purpose of *ḥadd* punishment, that is, general prevention, is only achieved by allowing the general public to witness and participate, for instance, in the case of stoning, in the punishment inflicted. According to the Sunnī jurists, individual deterrence is achieved by the suffering and pain caused to offenders while the punishment is being inflicted. This also involves a rehabilitation aspect which attempts to make the offender reluctant to re-commit the same offence. Rehabilitation, according to jurists,

²⁴⁹ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 158.

²⁵⁰ Cf. El-Awa, *Punishment in Islamic Law*, p. 29.

²⁵¹ Ibn al-Humām, *Fatḥ al-qadīr*, vol. 5, p. 218.

is achieved by not re-committing the same offence, and is equal to repenting from the sin committed. According to the jurists, the punishments of flogging, amputations and banishments have the dual impact of both general and individual prevention. In the following sections, I will provide an explanation of this claim in each area of flogging, amputation and banishment.

2.2.2.1 Flogging:

The consensus of Muslim jurists is that the punishment for committing adultery for non-married offenders is one hundred scourges. This is viewed as a non-fatal punishment (*al-ḥadd zājir lā-mutlif*) which is presumed to deter (*zajr*) both the public and the offenders.²⁵² A closer examination of the process of inflicting scourging is found in the narration attributed to the companion ‘Alī, where he is reported to have ordered the culprit’s clothes to be taken off in order to make sure that the scourging was painful.²⁵³ To support the jurists’ claim that the corporal punishments are meant to prevent (*radʿ*) the culprit from re-committing the offence, jurists extensively cited the narration attributed to ‘Alī which requested Muslims to “avoid dangerous spots such as the head and the genital areas.”²⁵⁴ The aspect of *tashhīr* is again evident in the process of flogging. The jurists specify the process of flogging in the following terms:

²⁵² Al-Shirāzī, *Al-Muhadhdhab*, vol. 5, p. 392.

²⁵³ Ibn al-Humām, *Fatḥ al-qadīr*, vol. 5, p. 218; Ibn Nujaym, *al-Baḥr al-rāʾiq*, vol. 5, p. 15; Al-Shāfiʿī, *Al-Umm*, vol. 6, p. 201.

²⁵⁴ Al-Shirāzī, *Al-Muhadhdhab*, vol. 5, p. 392.

Men are as a rule flogged while standing, whereas women are whipped while seated. Men are stripped to the waist (except when they are flogged for calumny), unlike women, who may leave their clothes on. However, furs and leather clothing are removed, as they would protect the offender against the pain. [...] It is commendable to carry out the punishment in public. The blows must be equally distributed over the body, with the exception of dangerous spots such as the head and the genital area.²⁵⁵

Moreover, jurists of the Shāfiʿī and Ḥanbalī schools of law set out a number of rules to make sure that the flogging punishment is inflicted fairly and in proportion to the offence, that is whether illegal sexual intercourse (*zinā*), calumny (*qadhf*) or drinking alcohol (*shurb al-khamr*). In fact they regard this way of inflicting the penalty as compulsory:

Flogging has to be administered by a leather whip. The executioner, in administering the lashes, may not raise his hand above his head to the extent that the armpit is visible. The force with which the lashes are administered varies with the crime: flogging for unlawful intercourse must be more painful than flogging for drinking alcohol. Flogging for drinking alcohol may, therefore, also be inflicted by palm leaves, twined cloth or shoes.²⁵⁶

Furthermore, jurists also debated the severity of the scourging and whether all the offences that are punished with scourging share the same

²⁵⁵ Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 16.

²⁵⁶ Al-Shāfiʿī, *Al-Umm*, vol. 6, p. 282; Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 15; Ibn Qudāma, *Al-Mughnī*, vol. 12, p. 510.

severity of scourging. For instance, Ibn Qudāma held that the severest scourging (*ashadd al-ḍarb*) in *ḥadd* punishments is the scourging for illegal sexual intercourse, then the scourging for *qadhḥ*, and finally the scourging for consuming alcohol.²⁵⁷ Mālik, on the other hand, viewed the severity of scourging to be the same because the Qurʾān is ambiguous about the severity of scourging.²⁵⁸ The Ḥanafīs went further and argued that scourging of *taʿzīr* is the severest, then the scourging for illegal sexual intercourse, then consuming alcohol and, finally, the scourging for *qadhḥ*. Ḥanafīs argued that God specifies the scourging of adultery as the verse stipulates “... scourge ye each one of them [with] a hundred stripes. And let not pity for the twain withhold you from obedience to God” (Q 24:2). It could be inferred from this discussion that the severity of the scourging is intended to cause pain and the graver the sin the more will the scourging be severe.

Clearly, the debate about what was the highest possible severity of the *ḥadd* scourging would indicate that even the jurists themselves are divided about the gravity of the *ḥadd* sins. In other words, jurists never agreed about the exact degree of gravity of the *ḥadd* offences; for example, would illegal sexual intercourse be graver than drinking alcohol? The Qurʾān does not specify the degree of obscenity of each *ḥadd* crime, even though all *ḥadd* offences are forbidden in the Qurʾān, and most of their punishments are prescribed in the Qurʾān, apart from stoning and banishment. Only God, according to the majority of Muslim jurists, knows the exact degree of the

²⁵⁷ Ibn Qudāma, *Al-Mughnī*, vol. 12, p. 511.

²⁵⁸ Saḥnūn, *Al-Mudawwana*, vol. 6, p. 2835.

sinfulness of each *ḥadd* crime. After all, *ḥadd* punishments are treated as the things “decreed by God”, and only God has the right to prohibit things, as He is the Creator of everything. The debate about the human ability to discern God’s intention behind Qur’ānic legislation is deeply rooted in the early history of Islamic theology (Cf. ch. 3).

2.2.2.2 Amputation (*qaṭʿ*)

Muslim Jurists applied a similar explanation to the theft offence. In general, the *zajr* aspect of the punishment is stressed. According to al-Shīrāzī, it is from the Sunnah principle that the thief’s right hand should be tied round his neck and he is required to walk around the crowd aiming to provide an example in order to deter people from committing the same offence.²⁵⁹ The four Sunnī schools of law argued that “cutting off the hand aims to deter and not to destruct (*al-ḥadd zājir lā mutlif*).”²⁶⁰

In certain instances, however, the *radʿ* aspect also enters into the picture. Ibn Taymiyya (d. 728/1328) argued that

the amputation of the hand is more of a deterrent (*zajr*) than execution (*qatl*) [...] as if people always see the amputated culprit this will remind them of his crime, and thus they will be deterred. Contrary to the amputation, execution could be forgotten, therefore, the amputation is more of a deterrent

²⁵⁹ Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, p. 446.

²⁶⁰ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 167.

to the culprit and the public (*fa-yakūnu hadhā ashaddu tankīlan lahu wa-li-amthāli*).²⁶¹

Ibn Qudāma provided a similar view about the amputation of the hand and its deterrent effect on both the individual and the public. He stated that “the thief’s right hand is to be cut off and tied round his neck for *radʿ* and *zajr*.”²⁶² Similarly, the purpose of amputation is constantly advocated in the jurists’ writings in the following terms: “the cutting off the right hand is meant as a deterrent (*al-qaṭʿ shurīʿa zājiran*) and not to destroy (*mutlifan*).”²⁶³

There is a tendency in the jurists’ dispute about ḥadd punishments as an individual deterrence to argue that there is the possibility for rehabilitation. Arguably, classical jurists assumed that the pain caused by flogging or amputating of the hand will inevitably rehabilitate the offender and thereby deter him from committing the crime again. Thus rehabilitation, as classical jurists conceived it, is fulfilled when the deterrent effect of ḥadd punishment is achieved. This means that, if the offence is not re-committed by the offender, ultimately his rehabilitation is achieved and he is again to be considered as a healthy member of the society and as a person who has been brought back to the straight path. According to the majority of Muslim jurists, individual deterrence (*radʿ*) is achieved when the person experiences the pain while the punishment is being inflicted.

²⁶¹ Aḥmad Ibn Taymiyya, *Al-Tafsīr Al-kabīr* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2000), vol. 4, p. 69.

²⁶² Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 107.

²⁶³ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 167; al-Baghawī, *Al-Tahdhīb*, vol. 7, p. 383.

There are two kinds of pain in the view of jurists: physical and psychological. The jurists to justify the severity of *ḥadd* punishments deploy both. The former is experienced in each penalty, and the latter is fulfilled by way of *tashhīr*. Punishment like stoning, scourging and amputation primarily aim to cause as much pain as is needed in order to deter the culprit from reoffending, thus converting him back into an obedient Muslim. Therefore, *tashhīr* is fulfilled by all means of punishment. For instance, theft punishment is presented in the *fiqh* tradition as combining physical and psychological effects on the culprit: the painful moment when the hand is being cut off, as well as the psychological pain of walking around the town with the amputated hand hanging round the neck. Last but not least, life with an amputated hand is assumed to constantly remind the culprit of the punishment awaiting him if he should re-commit the same offence in the future.

2.2.2.3 Banishment (*naḥy ‘an al-arḍ, taghrīb*)

The only punishment that has a fully developed aspect of *rad‘* is the punishment of banishment. According to the Islamic tradition, banishment is the penalty for the *ḥadd* offences of fornication (*zinā*) and banditry (*ḥirāba*).²⁶⁴ The majority of jurists replace the banishment punishment in banditry crimes with imprisonment until the culprit shows repentance and

²⁶⁴ Q, 5:33, and the *ḥadīth* tradition of Unays.

remorse.²⁶⁵ As for fornication committed by a fornicator who is not muḥṣan, banishment for a year was a complementary punishment according to all Sunnī schools except the Ḥanafīs.²⁶⁶ The Mālikīs approved it, but only for men, since banishment for women meant that they were forced to live far from their male relatives which could, therefore, lead to a life of debauchery.²⁶⁷ The Mālikīs held that banishment was a real deportation, but applied it only to male bandits.²⁶⁸ The Shāfi'īs required that a woman who was sentenced to a one-year banishment must be accompanied, at her own expense, by a close male relative to stay with her and watch over her.²⁶⁹ Furthermore, the punishment of *taghrīb* was justified as it was “aimed to torture the offender by expelling him away from home and family.”²⁷⁰ The banishment penalty shows, more clearly perhaps than most other *ḥadd* punishments, that individual deterrence and reformation of the offender was an important aspect in the law of *ḥadd*. Banishment did nothing to achieve general prevention; its main use and purpose was to reform the offender.

²⁶⁵ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 159, 234.

²⁶⁶ Al-Shāfi'ī, *Al-Umm*, vol. 6, pp. 181-182; Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 51.

²⁶⁷ Al-Qarāfi, *Al-Dhakhīra*, vol. 9, p. 375; Al-Baghawī, *Al-Tahdhīb*, vol. 7, pp. 327-328.

²⁶⁸ Al-Qarāfi, *Al-Dhakhīra*, vol. 9, p. 375.

²⁶⁹ Al-Shirāzī, *Al-Muhadhdhab*, vol. 5, p. 395; al-Ramlī, *Nihāyat al-Muḥtāj*, vol. 7, p. 429.

²⁷⁰ Al-Shirāzī, *Al-Muhadhdhab*, vol. 5, p. 377.

2.2.3 When *ḥadd* punishment is not a deterrent

The *fiqh* tradition knows of many problematic areas concerning the actual process of applying *ḥadd* punishments. The first issue here is the repetition of a *ḥadd* offence, for example when theft is committed three times or more, in particular after the offender has been previously punished. The four Sunnī schools of law show an awareness of the inescapable conclusion that in cases where the offender re-commits the theft crime, the previous punishment has not functioned as a deterrent preventing the culprit from re-committing theft. In this section, I limit my examination to the offence of theft, for the reason that jurists expanded their discussion in the context of this particular offence. The second issue I want to investigate is what happens, according to the jurists, when *ḥadd* offences overlap (*tadākhul l-ḥudūd*), either with the same offence or with different *ḥadd* offences. Sunnī jurists were in general more inclined to dispute that each case has different legal implications, as I will show below in more detail.

2.2.3.1 Repetition of *ḥadd* offences

According to the Sunnī jurists, there are cases reported in the *Ṣaḥāba* tradition where theft was committed several times. Sunnī jurists agreed that after the first incident of theft the punishment is, as prescribed in the Qurʾān, to amputate the thief's right hand. However, they disputed the legal implications of the repetition of the theft offence after the second incident. Naturally, the classical jurists were confronted with cases where theft had been committed for a second, third and fourth time. In this case the jurists

faced the problem of determining a punishment for each of these offences: Should there be cross-amputation? That is, should amputation of the right hand (for the first instance of theft) be followed by amputation of the left foot (for the second instance), amputation of the left hand (for the third instance), and amputation of the right foot (for the fourth instance)? But jurists also had to consider the case of a thief committing as many as five theft offences. Should a different punishment be used?

According to the Shāfi'is, Mālikis and the Ḥanafī al-Kāsānī, the culprit was to be punished for each theft offence he committed. This argument they based on *qiyās*.²⁷¹ The *ḥadd* punishment for theft is a pure (*khālīṣ*) right of God, and since the offence can be repeated, the punishment is repeatable too.²⁷² The Shāfi'is and Mālikis held that, in the third incident of theft, the thief's left hand is to be cut off and in the fourth incident the left foot is to be cut off. If theft is committed a fifth time, the thief is to be sent to prison.²⁷³ The Shāfi'is and Mālikis also relied on a narration according to which the companions Abū Bakr and 'Umar b. al-Khaṭṭāb said that "if the thief commits the offence for the third time his left hand should be cut off, and if he commits the offence for the fourth time his right foot to be cut off. In case he

²⁷¹ Al-Shāfi'ī, *Al-Umm*, vol. 6, pp. 175-176; al-Nawawī, *Rawḍat al-ṭālibīn*, vol. 7, 313; al-Ramlī, *Nihāyat al-muḥtāj*, vol. 7, p. 466; al-Shirāzī, *al-Muhadhdhab*, vol. 5, p. 444; al-Qarāfī, *al-Dhakhira*, vol. 9, pp. 457-458.

²⁷² Al-Sarakhsī, *Al-Mabsūt*, vol. 9, p. 196.

²⁷³ Al-Nawawī, *Rawḍat al-ṭālibīn*, vol. 7, p. 313; al-Qarāfī, *al-Dhakhira*, vol. 9, pp. 457-458.

commits the same offence for the fifth time he is to be sent to prison as (*ta'zīr*).²⁷⁴

The Ḥanafīs al-Sarakhsī, al-Jaṣṣāṣ and the Ḥanbalī Ibn Qudāma limited the theft punishment only to the second offence. They held that, in the first incident of committing theft, the thief's right hand was to be cut off and in the second incident his left foot was to be cut off (cutting off the left foot is based on *qiyās* to the punishment for *ḥirāba*).²⁷⁵ In the case where there was a third incident of a theft offence, the thief was to be sent to prison as *ta'zīr*. The imprisonment would last until the thief repented and showed genuine remorse.²⁷⁶ The Ḥanafīs' objection to the Shāfi'īs and the Mālikīs' verdict was based on another narration, traced back to the Companion 'Alī. He is reported to have been requested to judge a thief with an amputated hand and foot for committing theft for the third time. 'Alī is reported to have consulted the other Companions about the punishment. The Companions are reported to have advised him to execute the thief. 'Alī responded that he was not to be executed, nor were his left hand and right foot to be cut off, since this would make it impossible for him to feed and clean himself.²⁷⁷

Obviously, the Shāfi'īs and Mālikīs' consensus was based on Abū Bakr and 'Umar's narration and ignored 'Alī's narration. Thus, they could argue that the Ḥanafīs and Ḥanbalīs had gone against a well-established (*thābit*)

²⁷⁴ Al-Kāndahlawī, *Awjaz al-masālik*, vol. 15, p. 438.

²⁷⁵ Aḥmad Al-Jaṣṣāṣ, *Aḥkām al-Qur'ān* (Mecca: Al-Maktaba Al-Tijāriyya, n.d.), vol. 2, p. 594.

²⁷⁶ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 167, 197; Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 109.

²⁷⁷ Al-Kāndahlawī, *Awjaz al-masālik*, vol. 15, p. 439; al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 166; al-Kāsānī, *Badā'ī al-ṣanā'ī*, vol. 9, 248.

Sunnah of the Companions. The Shāfi'īs and the Mālikīs claimed that the story about 'Alī was not an established (*thābit*) narration. The Ḥanafīs responded to the Shāfi'īs by arguing that “by repeating the punishment and extending it to the left hand and right foot this will undoubtedly lead to consume (*yastahlik*) the thief's ability for his basic needs”.²⁷⁸ Al-Shāfi'ī responded to the Ḥanafīs by reasoning that

their claim the *ḥadd* punishment must be prevented from being applied if [the offence is] repeated is baseless because *ḥadd* punishments are not preventable for the reason you [Ḥanafīs and Ḥanbalīs] assumed. Since the thief still has the ability to steal the *ḥadd* of God is not to be prevented or waived from being implemented (*wa-inna l-yad wa-l-rijl hiya mawāḍi' al-ḥadd ... fa-matā kāna al-mawāḍi' qā'imān ḥudda 'alayhi*).²⁷⁹

Since the Qur'ān and the Prophetic *ḥadīth* are silent about the repetition of the *ḥadd* offence, jurists based their reasoning about this problem on *ṣaḥāba* tradition and *qiyās*. This led them to extend the amputation punishment to the left hand and the feet. As the jurists argued, the principal aim of the *ḥadd* legislation, in particular the theft punishment, was to deter the thief from re-committing the same offence. Where the offence was re-committed several times, jurists argued that the re-implementation of *ḥadd* punishment prevented the thief from using his hands or feet to steal again. By this, individual deterrence was achieved.²⁸⁰ The

²⁷⁸ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 106; al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 167.

²⁷⁹ Al-Shāfi'ī, *Al-Umm*, vol. 6, p. 176.

²⁸⁰ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 198.

Shāfi'ī al-Baghawī (d.516/1122) explained the purpose of extending the punishments in the repeated offence in these words:

When the amputation of the thief's left foot does not serve as a deterrent after the second incident of theft (*inna al-sāriq lammā lam yanzajir bi-qat'i rijlihi al-yusrā fī-l-marra al-thāniya*) then it has become known to us that the criminal is obsessed by this crime (*'ulima anna al-ijrām mutamakkin min nafsih*). In this situation the amputation of the left hand serves to destroy his ability to seize [objects] illegally (*hattā tafāwat 'alayhi manfa'at al-baṭsh*). In the fourth incident of theft it is known to us that the punishment did not deter the thief. However, it is then appropriate to amputate his right foot in order to destroy his ability to walk, because theft relies on the ability to seize illegally and to walk (*'ulima annahu lam yanzajir fa-nāsaba qat' rijlihi al-yumnā hattā tafāwat 'alayhi manfa'at al-mashy, fa-inna al-sariqa innamā takūnu bi-l-baṭsh wa al-mashy*).²⁸¹

The Ḥanafī al-Jaṣṣāṣ, on the other hand, held that the implementation of *ḥadd* punishment in the second incident of theft, that is, amputation of the left foot was a scholarly consensus. But he also pointed out that no consensus existed regarding the third and fourth incidents of theft. Thus, for al-Jaṣṣāṣ, if the jurists' consensus was not established there ought to be no further amputation (*lam yajuz qat'uhu mā 'adam al-ittifāq*).²⁸² Al-Jaṣṣāṣ also rejected applying *qiyās* to justify the amputation of the third and the fourth extremity, in accordance with the Ḥanafī rejection of *qiyās* in the law of *ḥadd* (*la yajūz ithbāt l-ḥudūd bi-l-qiyās*).

²⁸¹ Al-Baghawī, *Al-Tahdhīb*, vol. 7, p. 383.

²⁸² Al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. 2, p. 593.

Arguably, the fault of the jurists, and particularly of the Shāfi'īs and Mālikīs, lay in regarding the hands and feet of the thief as the only instruments (*al-āla*) which can be used to commit the offence.²⁸³ If someone wants to commit theft, it could be said that he is going to use whatever means are necessary to steal, from forming the intention (*niyya*), using his power to reason (*'aql*) to plan, to finally executing the plan and using his whole body including his hands and feet to steal and move away from the place where the goods are kept. The jurists' understanding seems overly mechanical and not very interested in what could be called the psychology of theft, including considerations about the deterring effects of punishment on the thief.

The Shāfi'īs and Mālikīs seem to lean in this 'mechanical' direction even more heavily than the Ḥanafīs and Ḥanbalīs. The Shāfi'īs and Mālikīs judged the repeated offender strictly on the basis of what was apparent, and on *qiyās* – for them, theft was theft, and the punishment for theft was amputation. The Ḥanafīs (with some exceptions, such as al-Kāsānī) and the Ḥanbalīs, on the other hand, seem to suggest that, if a thief was not reformed by having one hand and one foot cut off, to amputate more members of his body would not lead to the desired result either, that is, to individual deterrence. In such a case, it is preferable, in fact nothing remains to be done, but to lock the thief away in prison. Therefore, one can argue that the Ḥanafīs and Ḥanbalīs paid greater attention to the potential of *ḥadd* to

²⁸³ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, pp. 50-51.

“reform” the criminal; individual deterrence (*radʿ*), in their view, had a more important role to play in explaining and justifying punishment than it had among the Shāfiʿīs and Mālikīs.

2.2.3.2 Overlap of *ḥadd* offences (*tadākhul* or *ijtimāʿ al-ḥadd*)

Classical jurists extensively discussed the issue regarding the overlap of *ḥadd* offences (*tadākhul al-ḥudūd*). According to the jurists’ writings, the overlap between *ḥadd* offences occurs in three scenarios, each of these scenarios having its own legal regulations, and consequently having different legal implications. These scenarios are as follows:

(1) A single *ḥadd* offence where several parties are injured:

The example given for this scenario is the offence of the false accusation of committing illegal sexual intercourse (*qadhf*). The Ḥanafī jurists in this particular scenario speculated that the culprit accused one person or a group of people several times on one occasion. If one of the falsely accused brings the case to the judge the accuser is to be punished only once with eighty lashes. In the case where the other accused parties decide to bring the case before the judge, the *ḥadd* should not be applied. This is because, if one of the accused brought the case to the judge, it would not be as if all the injured parties brought the case to the judge (*ḥudūr baʿḍihim li-l-khuṣūma ka-ḥudūr kullihim fa-lā yuḥadd thāniyan*).²⁸⁴ According to Ibn al-Humām, *ḥadd*

²⁸⁴ Ibn al-Humām, *Fatḥ al-qadīr*, vol. 5, p. 324.

punishment is due whenever the offence is proved, once the *ḥadd* crime is brought before the judge, and when it is proven thereafter. One *ḥadd* punishment is enough to achieve the *ḥadd* purpose, that is, *zajr*. The numbers of the *qadhf* accusations occurring at one time would be punished with only one *ḥadd* punishment of eighty lashes.²⁸⁵

The Mālikīs held a similar argument to that of the Ḥanafīs and regarded that “one *ḥadd* punishment is sufficient, even if the culprit were to accuse a group of people in different places (*idhā kararra al-qadhf li-wāḥid aw li-jamā’a fī majlis aw-majālis fa-laysa ‘alayhi ilā ḥadd wāḥid*).”²⁸⁶ The Mālikīs’ position about the overlap of *ḥadd* offences distinguishes between whether the injured right was a right of God or a right of the individual. Where the transgression occurred against a right which belonged to God, that is, illegal sexual intercourse, theft, apostasy, banditry, and drinking alcohol, all *ḥadd* offences would be amenable to overlap. In other words, if the aforementioned offences were committed by the culprit the culprit would suffer capital punishment for apostasy, the remaining punishments being dismissed.²⁸⁷ On the other hand, where the transgressed right belonged to the individual, that is, where it is a right of *qiṣāṣ*, the culprit’s offences did not overlap and the culprit would be punished for his offences.²⁸⁸

Ḥanafī jurists justified this by arguing that the intended purpose (*maqṣūd*) of applying *ḥadd* was to deter (*zajr*) and that deterrence would be

²⁸⁵ Ibid, p. 325.

²⁸⁶ Al-Khurashī, *Ḥāshiyat al-Khurashī*, vol. vol. 8, p. 302.

²⁸⁷ Ibid, vol. 8, p. 302.

²⁸⁸ Ibid.

achieved and fulfilled only by applying the punishment for one *ḥadd* offence. If the *ḥadd* punishment was to be implemented two or three times, the probability (*iḥtimāliyya*) would be that there is no benefit (*‘adam al-fāʿida*) in applying the *ḥadd* punishment. However, the *ḥadd* must not be implemented if it were not going to benefit and achieve its primary aim, that is, deterrence (*la yajūzu iqāmat al-ḥadd ma‘a iḥtimāl ‘adam al-fāʿida*).²⁸⁹

Contrary to the Ḥanafīs, the Shāfi‘īs held that when a free man falsely accuses a group of people of having committed illegal sexual intercourse or if he denigrates their lineage, his punishment should be one *ḥadd* punishment of eighty lashes for each of the group. Hence, he would be punished with the first *ḥadd* and then, after a while, punished for the rest of his accusations.²⁹⁰ Al-Shīrāzī argued that the punishment for *qadhf* was inflicted to protect the people’s reputation (*daf‘ al-‘ār*). If someone accused a number of people of *qadhf* in one utterance, he was to be punished with eighty lashes for every single person that he had accused.²⁹¹ Here, emphasis is more on the individual’s right, since the *ḥadd* punishment of *qadhf* was inflicted for transgressing against the rights of individuals. Where *ḥadd* punishments are regarded as God’s rights and the offences have been committed several times or overlapped, one punishment would be sufficient to deter the culprit. This is the scenario is presented in the Shāfi‘īs’ writings: if an unmarried adulterer

²⁸⁹ Al-Kāsānī, *Badāʾi‘ al-ṣanāʾi‘*, vol. 9, p. 248.

²⁹⁰ Al-Baghawī, *Al-Tahdhīb*, vol. 7, p. 404.

²⁹¹ Al-Shīrāzī, *Al-Muhadhdhab*, p. 412.

commits adultery several times he is to be punished with only one *ḥadd* punishment.²⁹²

(2) Several *ḥadd* offences of a different kind of offences, one of which is punished with capital punishment

A scenario presented in the Ḥanafis' *furūʿ* goes as follows. Suppose a person confessed that he had committed illegal sexual intercourse as well as theft, that he had drunk alcohol, falsely accused someone of committing illegal sexual intercourse, *and* made someone lose his eyesight. The Ḥanafī jurist Ibn al-Humām held that the retaliation for *qiṣāṣ* for the injured eye was to the first to be pursued. After the culprit had recovered from the retaliation punishment, that is the removal of one of his eyes, the culprit was to be scourged eighty stripes for the *qadh* offence. Then the Muslim ruler would choose between either carrying out the *ḥadd* punishment for theft or the illegal sexual intercourse, both offences being God's rights. Then the Muslim ruler would punish the culprit with forty lashes for drinking alcohol. In the case where the culprit was married (*muḥṣan*), the order of the punishments changes as follows: retaliation (*qiṣāṣ*), eighty lashes for *qadh*, and stoning for the illegal sexual intercourse. In this scenario, the punishments of theft and drinking alcohol would be dismissed. This was because according to the general theory about *ḥadd* overlap in the Ḥanafī doctrine, whenever a capital punishment overlaps with a corporal *ḥadd* punishment, the latter is dismissed

²⁹² Ibid., p. 373.

and the former is inflicted (*wa matā ijtamaʿat ḥudūd Allāh li-ḥaqq Allāh wa fihā qatl nafs qutila wa-turika mā siwā dhālika*).²⁹³ Ibn al-Humām argued that capital punishment in this scenario was sufficient to deter (*zajr*) and the general deterrence would be achieved. Further, Ibn al-Humām argued that there would be no benefit in applying corporal punishments and that capital punishment was sufficient to deter the public; thus, the judge should not worry himself about inflicting other corporal punishments when a capital offence overlaps with other *ḥadd* corporal offences.²⁹⁴ The Mālikīs agreed with the Ḥanafīs and viewed that whenever *ḥadd* offences overlapped and there was a capital punishment, the former was to be inflicted and all the corporal punishments of *ḥadd* dismissed, except in the case of *qadhḥ* where the culprit was to be scourged with eighty stripes and then executed.²⁹⁵ Ḥanafīs, Mālikīs and Shāfiʿīs agreed that, if an individual's right overlapped with God's right, the former was to be vindicated first and then the latter.

(3) Several *ḥadd* offences of a different kind, none of which is punished with capital punishment

In this scenario jurists speculated about overlapping *ḥadd* offences of a different kind, none punishable with capital punishment. For instance, an unmarried man consumes alcohol, fornicates and steals. According to the Shāfiʿīs, the judge was to start with the less severe punishment of *ḥadd*

²⁹³ Ibn al-Humām, *Fatḥ al-qadīr*, vol. 5, p. 326.

²⁹⁴ Ibid.: *wa-atammu mā yakūnu minhu bi-istifāʾ al-nafs wa al-ishtighāl bi-mā dūnihi lā yufid*.

²⁹⁵ Al-Qarāfī, *Al-Dhakhira*, vol. 9, p. 470: *matā ijtamaʿat al-ḥudūd maʿa al-qatl saqāṭat bi-l-qatl illā al-qadhḥ fa-innahu yujlad thumma yuqṭal*.

(*qudima al-akhaff fa-l-akhaff*). In this scenario the punishment of consuming alcohol would first be inflicted, that is, eighty lashes. Then punishment of the illegal sexual intercourse, that is, one hundred lashes would be inflicted. Finally, the punishment of theft, that is, the amputation of the right hand, would be inflicted.²⁹⁶ The Shāfi'īs held that it was an obligation to treat the overlapping *ḥadd* punishments in this sequence, starting with the less severe and ending with the most severe. All the overlapping *ḥadd* corporal punishments should be implemented.

The Mālikīs added to this scenario *ḥadd* offences that overlap with *qiṣāṣ* injuries. For instance, a culprit commits theft and injures a victim's right hand by amputating it. In this scenario God's right and the individual's right are to be vindicated. The jurists' debate about whether, in this scenario, one must amputate the right hand to satisfy God's right for committing theft, or to fulfil the law of retaliation (*qiṣāṣ*). The Mālikīs held that God's right must be vindicated because there was no pardoning in *ḥadd* offences, especially once the case was brought before the judge.²⁹⁷

Furthermore, if the offender committed several offences which did not entail capital punishment, he would be punished for each offence, starting with the least severe and ending with the severest punishment. Ibn Qudāma states that

²⁹⁶ Al-Shīrāzī, *Al-Muhadhdhab*, p. 372.

²⁹⁷ Al-Qarāfi, *Al-Dhakhira*, vol. 9, p. 470: *in ijtama'a ḥadd Allāh wa-ḥadd al-'ibād budi'a bi-ḥadd Allāh li-ta'adhdhuri al-'afw fihi*.

if an offender drank alcohol, then falsely accused a woman, then fornicated and finally stole money, the jurists agreed that he is to be first punished with either 40 lashes for consuming alcohol, then he is to be punished with 80 lashes for his false accusation, unless the accuser forgives him. Then the offender is to be lashed for his fornication with 100 lashes. The final punishment is to amputate his right hand for his theft offence.²⁹⁸

2.2.3.3 The uncertainty of *ḥadd* justification as a deterrent

The *fiqh* tradition proposes a variety of justifications for *ḥadd* punishments. There are three main juristic justifications presented in the writings of Muslim jurists. However, these justifications are not systematically presented, instead, *ḥadd* punishments are variously justified whenever the context happens to invite this. The first justification proposed in the juristic tradition, the one I have discussed in the preceding chapter is that *ḥadd* punishments serve to satisfy a right of God. The second justification is that *ḥadd* punishment serves as a deterrent tool to the general public and the individual. Arguably, Sunnī jurists characterised *ḥadd* punishments as deterrents (*zawājir*) particularly when they sought to justify the severity of *ḥadd* punishments, that is, in order to justify capital and corporal punishments. Sunnī jurists proposed that God’s ultimate purpose behind legislating *ḥadd* punishments was “to rid the earth of obscene and indecent acts, and that is only provided through the *zajr* effect of *ḥadd*

²⁹⁸ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 75.

punishments.”²⁹⁹ Generally, jurists insisted on associating the severity of *ḥadd* punishments with the deterrence effect of these punishments. Consequently, whenever jurists explained the procedure and the process of inflicting the severe punishments they justified this severity by arguing that it served the main purpose of *ḥadd* punishments, namely, to deter people and individuals from exceeding the limits prescribed by God in the revealed law. For instance, the penalty for *zinā* offence is defined as *ḥadd* because it prevents the public from committing the crime again. *Ḥadd* punishments are perceived as establishing or drawing the line between the permissible (*ḥalāl*) and the forbidden (*ḥarām*). Thus, some of the punishments deter others (*zajr*) from committing the forbidden offences and some deter (*radʿ*) from a re-committing of the crime.

In fact, there is a great deal of uncertainty among the jurists as to how to describe the function and purpose of *ḥadd* punishments. The jurists’ uncertainty in justifying the severity of *ḥadd* punishments as deterrents, for example, in theft (*sariqa*) and banditry (*ḥirāba*), is arguably related to the nature of the Qurʾānic verses which address these offences. As to the theft offence, one verse states that “as for the male thief and the female thief, cut off their hands as a recompense (*jazāʿ*) for that which they committed, a punishment by of example (*nakāl*) from God.”³⁰⁰ The verse explicitly addresses the justification of the theft punishment as recompense (*jazāʿ*); in other words, retaliation is the justification most prominently mentioned in

²⁹⁹ Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 8.

³⁰⁰ Q 5:38.

the Qurʾān for amputating the thief's right hand. Similarly, the punishment for banditry is addressed in the Qurʾānic verse which stipulates that "the recompense of those who wage war against God and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their feet be cut off from opposite sides, or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter."³⁰¹ Al-Sarakhsī commented on these two verses by stating that "each verse addresses the punishment, as God refers to the first as recompense (*nakāl*) and the second as disgrace (*khizy*). Therefore, each penalty is addressed as the forbidden acts of either theft or banditry and each of them is a right of God."³⁰²

The third and most widespread justification of *ḥadd* punishments among Muslims was the depiction of the *ḥadd* punishment as an expiatory act (*kaffāra*) serving to expiate the culprit from punishment in the hereafter. The justification of *ḥadd* punishments to serve as an expiatory act will be discussed in the next chapter.

³⁰¹ Q 5:33.

³⁰² Al-Sarakhsī, *Al-Mabsūt*, vol. 9, p. 155.

2.3 Deterrence and the immutability of *ḥadd* in *fiqh*

In conclusion, it should be pointed out that much of the focus of Sunnī juristic discussion regarding the *ḥudūd Allāh* and how to implement the punishments that are associated with these norms is on the validity and the effectivity of the judicial procedure of *ḥadd* punishments. Here is where the emphasis lies, much more at least than on systematic justification of capital and corporal *ḥadd* punishments.³⁰³

The classical jurists, in their discussion of *ḥadd* punishments as serving the aim of individual deterrence, all tended to assume that corporal punishments (e.g. scourging, amputating and imprisonment) deter culprits from re-committing their crimes. However, this assumption cannot be said to have been exact or realistic. This is already shown by the very fact that the jurists themselves were involved in an endless dispute about the repetition of *ḥadd* offences and the overlap of various *ḥadd* offences: this suggests that the jurists themselves had an inkling of the inability of *ḥadd* punishments to achieve individual prevention. However, this inkling is never systematically pursued by the jurists or turned into a fully developed argument. There is no sustained single attempt to question the inefficiency of the *ḥadd* punishment and whether it functions as a deterrent for offenders. This is particularly

³⁰³ Throughout the reading of the jurists' writings, one finds that the majority of Muslim classical jurists attempted to emphasise the validity and the effectivity of the *ḥadd* procedure, for example: demands of testimonial evidence for *ḥudūd* offences, and the suspension of punishment where there was the slightest doubt is detected.

obvious in relation to the theft punishment, because jurists speculated that the thief may commit the theft offence and that the punishment was not a deterrent.

Likewise, the jurists never questioned whether *ḥadd* punishments are ‘just’ or ‘unjust’. Punishments could only be ‘unjust’ with regard to the procedural details of their implementation, that is, when there was a failure in *ḥadd* procedure. For example, a major concern of the jurists revolved around how the legislator or the judge could re-implement the same punishment. Where this was necessary and there was a shortage of limbs for amputation they did not hesitate to legislate imprisonment (*ḥabs*) as the final option. The law in such cases does not provide for the offender. To some degree, the culprit’s destiny is in his own hands: he needs to repent and show remorse in order to be set free. But in sum, one cannot but agree with El-Awa that the Islamic law of *ḥadd* punishments, at least as presented in the *fiqh* tradition, “cares very little for the criminal and his reform.”³⁰⁴

In reference to *ḥadd* punishments serving as general prevention (*ẓajr*), Sunnī jurists proposed that *ḥadd* punishments served the primary aim of deterring the Muslim public from committing acts considered obscene by tradition. This is evident throughout the jurists’ debate regarding the ways in which *ḥadd* punishments should be implemented. Although the Qur’ānic verse recommends that people witness the punishment of scourging for fornication, the verse in question requests only the witnessing of the

³⁰⁴ El-Awa, *Punishment in Islamic Law*, p. 134.

punishment – there is no mention of participating in the process of scourging. But the jurists introduced this element in order to achieve the aim of general prevention. The terms of inflicting the punishments, in particular the demand for the direct involvement of the ruler and the witnesses in scourging and stoning, are clearly the outcome of the jurists' disputes about *ḥadd* punishments, procedures and justifications.

Even though the jurists sometimes discussed *ḥadd* punishments in terms of deterrence (thus seemingly opening a door for determining the law in the light of social reality), I have suggested that classical jurists generally stuck to the elementary assumption that *ḥadd* punishments are God's rights, and that therefore, they are fixed and eternally immutable. Their attempts to justify *ḥadd* punishments, whether as deterrents or as serving other purposes, are limited because, as I discussed in detail in chapter one, they projected *ḥadd* punishments as *muqaddarāt* ("things decreed by God") and generally agreed that there was little that could be done to waive the *ḥadd* punishment. Arguably, classical legal discussions of *ḥadd* punishments in terms of deterrence was only of a secondary importance.

Ḥadd punishments are presented firmly as the immutable law of God. The Islamic ruler (God's representative on earth) is obliged to implement them without any alteration or modification. Muslim jurists discussed the laws of *ḥadd* only from within the limits of the immutable law whose boundaries they had themselves drawn. Indeed, the classical jurists mostly exercised their legal reasoning within the rules drawn from the Qur'ān, Prophetic and *ṣaḥāba* tradition. It has even been shown in this chapter that

there was a measure of non-rationality in the Shāfi'is and Mālikīs' approach to *ḥadd* punishments. This is manifest in their disputes about the repetition of *ḥadd* offences, particularly in reference to the repetition of theft offence. They assumed that *ḥadd* punishments are immutable, as are their punishments, as dictated in the Qur'ān and the Sunnah tradition. This led them to think only of the punishment and how it should be implemented rather than about the wisdom (*ḥikma*), or the purpose, behind the legislation of *ḥadd* punishments and whether or not *ḥadd* punishments were always an effective deterrent. This has been clearly shown throughout their arguments regarding the re-implementations of *ḥadd* punishments in the situations where there are repeated offences, for example, a theft offence committed four times.

However, despite juristic claims about the immutability of the law of *ḥadd*, the Sunnī *fiqh* offers some examples where *ḥadd* punishments are treated in a more mutable and flexible way, and in some cases waived. For instance, all Sunnī jurists replaced the punishment of banishment for *ḥirāba* with that of imprisonment. This is an obvious contradiction to the Qur'ānic verse on banditry which dictates explicitly banishment as one of the four punishments for *ḥirāba*. For instance, al-Shāfi'ī provides a description of banishment (*ṣifat al-naḥy*) by arguing that “banishment is either established in the Qur'ān [the banishment for banditry] or in the *Sunnah* [the banishment for adultery].”³⁰⁵ However, the Sunnī jurists' consensus was that the bandit (*muḥārib*) had to be imprisoned instead of being banished. They argued that

³⁰⁵ Al-Shāfi'ī, *Al-Umm*, vol. 6, p. 202.

this was the better or more plausible (*awlā*) choice because banishing would allow the culprits to re-commit banditry and harm people.

Now, changing the punishment for *ḥirāba* from banishment to imprisonment was a clear modification and alteration of one of God's decreed punishments. Whatever the explanations behind this change, I would suggest that the jurists went beyond the confines of the revealed law by equating the punishment of 'banishment' and 'imprisonment'. For in reality, these are significantly different. This was sometimes recognized: For example, Ibn Qudāma subscribes to this position, arguing that "the apparent meaning (*ẓāhir*) of the verse is that banishment (*naḥy*) is different from imprisonment (*ḥabs*)".³⁰⁶ I would suggest that the jurists undermined the general principle of the immutability of *ḥadd* punishments when they replaced the punishment of banishment with imprisonment. Another example is their waiving banishment for female adulteress and capital punishment for female apostates.

Another contradiction is manifest in the theory of *ḥadd* as achieving deterrence (*zajr*) rather than causing destruction (*mutlif*) to the offender. Take the Shāfi'is and Mālikis' discussion of the four-time repetition of the theft offence. Shāfi'is and Mālikis constantly upheld the principle that *ḥadd* punishments deter and do not aim to destroy the offender. However, they held that the theft punishment should be re-implemented each time the crime

³⁰⁶ Ibn Qudāma, *Al-Mughnī*, vol. 12, p. 483.

was committed, that is, up to four times. But such multiple amputations of the limbs undoubtedly have a detrimental or 'destructive' impact.

As for the Ḥanafīs, there is a methodological error in their approach to *ḥadd* punishments. They firmly held that *ḥadd* punishments should not be adjudicated on the basis of *qiyās* (*lā yajūzu 'indanā ithbāt l-ḥudūd bi l-qiyās*).³⁰⁷ However, in some instances, they do seem to apply *qiyās*, for example, when they argue for punishing the second incident of a theft offence in analogy to the punishment for *ḥirāba*, that is, with cross-amputation. According to their own general principle, *qiyās* in this case is invalid. If the Qurʾān has the ultimate authority in defining *ḥadd* offences and their punishments, and if the tradition of the Prophet does not stipulate anything else, then in this case of a repetition of theft crime no amputation other than the right hand should be inflicted.

In sum, the different interpretations of *ḥadd* punishments, and therefore, the rules of their implementations vary between the schools of law. This has been shown to be the case particularly in the example of the theft offence. Furthermore, although the disputes of Sunnī jurists provide an illustration and instruction for *ḥadd* punishments as well as the rationale for them, there is a deviation from the jurists' dispute in some instances. I have argued that the deterrent and punitive measures will vary depending on whether it is a first-time offence or whether it is a repeat or an overlapping

³⁰⁷ Al-Jaṣṣāṣ, *Aḥkām Al-Qurʾān*, vol. 2, p. 603.

offence and whether there is a direct literal interpretation of the Qurʾān, the Prophetic *Sunna* and the *ṣaḥāba* tradition.

The juristic doctrine of *fiqh* which describes the purpose of the *ḥadd* punishment as for the protection of the community could have allowed for a completely ‘objective, profane’ theory of punishment. Nonetheless, this was always secondary to the stress on deterrence and ‘warning’; this did enable the jurists to be flexible and allow for a measure of the religious connotation of punishment [the jurists may have reasoned that, if a crime is threatened with violent corporal punishment, people are also instructed religiously and ethically...]

Ch. 3: *Ḥadd* Punishments as Expiatory Acts (*Kaffārāt*)³⁰⁸

3.1 Introduction

Perhaps the most conventional justification for *ḥadd* punishment prevailing among Sunnī Muslim jurists was to declare them to serve as an expiatory act (*kaffāra*) that amends wrong actions, sins, or crimes. As Lange observes, “*ḥadd* and *kaffārāt* were often viewed in close conceptual proximity to each other; and some thought that to suffer the former constituted a variety of the latter.”³⁰⁹ Nonetheless, a careful examination for the justification of the *ḥadd* punishment as expiating the *ḥadd* offence and thus forestalling punishment in the hereafter will reveal that there is a certain tension between the views of classical jurists, especially between Ḥanafīs and Shāfi‘īs. This chapter investigates the juristic disagreement (*ikhtilāf*) about whether *ḥadd* punishment expiates committed sins or whether the culprit’s repentance (*tawba*) is the more important means to amend for committed

³⁰⁸ I wish to draw the attention that few Western scholars have recently studied the juristic debate on *ḥudūd* punishments to serve as *kaffārāt*. One of those who have closely examined the Sunnī account of *ḥudūd* as *kaffārāt* in the *fiqh* tradition is Christian Lange. While in his recent article “Sins, expiation and non-rationality in Ḥanafīs and Shāfi‘īs *fiqh*” Lange devotes his attention to examine the applicability of legal reasoning (*qiyās*) to the things decreed by God (i.e. *ḥudūd*, *kaffārāt*); with special reference to two Sunnī schools of law, namely, the Ḥanafīs and the Shāfi‘īs. In this chapter I tackle Sunnī juristic justification of the *ḥadd* punishment as expiation and repentances vs. *kaffāra*. In doing so, this chapter is only concerned with the justification of *ḥadd* as expiation. For further discussion on the debate on Sunnī legal methods related to juristic treatment of “the things decreed” by God see Lange’s “Sins, expiation and non-rationality in Ḥanafīs and Shāfi‘īs *fiqh*”. Forthcoming.

³⁰⁹ Lange, *Justice, Punishment and the Medieval Imagination*, p. 185.

sins. This question is important because if to suffer *ḥadd* punishments is regarded as a form of expiation, it becomes religiously more acceptable to implement them; indeed to carry out *ḥadd* punishments, in such a perspective, becomes a way of facilitating divine mercy towards humankind.

Against the Shāfi'īs, Mālikīs and Ḥanbalīs, the Ḥanafī school of law held that the punishment was not enough to atone for the committed sins, and that *tawba* of the offender was much more important. What accounts for this difference? Arguably, the underlying reason behind this tension is the fact that the Ḥanafīs' scrutiny of the purpose, or *ratio legis*, of the *ḥadd* punishment is restricted because the *ḥudūd* belong to the category of "things decreed by God" (*muqaddarāt*).³¹⁰ Was God's intention in legislating the *ḥadd* punishment to physically torture and punish the sinner? Or was it to deter the individual from committing similar sins? Or has God intentionally not revealed the *ratio legis* of *ḥadd*? To all these questions, the Ḥanafīs were reluctant to provide an answer. On the other hand, the Mālikīs, Shāfi'īs and Ḥanbalīs restricted their attempts in scrutinising the underlying purpose of the *ḥadd* punishment to the Qur'ānic and Prophetic texts. This rests on the

³¹⁰ Lange in "Sins, expiation and non-rationality in Ḥanafīs and Shāfi'īs *fiqh*" counts the things known in Sunnī theological tradition as "*muqaddarāt*" "things decreed by God (*muqaddarāt*): (1) the sustenance that God grants (*rizq*) (Cf. EI, 2nd, vol. viii, p. 567b); (2) the moment of birth and death that God imposes (Cf. EI, 2nd, vol. vi, p. 910b); (3) the actions predetermined by God; (4) and a life of happiness (*sa'āda*) (Cf. EI, 2nd, vol. viii, p. 657b) or of affliction (*shaqāwa*) (EI, 2nd, vol. ix, p. 246b) that God bestows on man." Lange denotes that "*muqaddarāt* convey different meanings in theology and law". In the former, Lange indicates that "[...] it conveys the idea of God's decree, or even of predestination (*qadar*), based on God's absolute knowledge (*ilm muṭlaq*) and power (*qudra*) over His creation." Ḥudūd offences and the punishments associated with them fall under this particular category.

Prophetic tradition that declared expiation (*takfīr*) to be one of the justifications for *ḥadd* punishment.

This chapter examines the justification of *ḥadd* punishments as expiatory acts on the basis of a systematic analysis of the legal development of the concept of *kaffāra*, related specifically to *ḥadd*, in the Qurʾān, the Prophetic tradition and in the classical *fiqh* tradition. As we have seen in the previous chapters, *ḥadd*, particularly when implying a severe punishment, is justified as either to preserve a right that belonged to God (*ḥaqq Allāh*), or to deter the individual and the general public from committing forbidden offences. In this chapter, I attempt to demonstrate that in comparison, there is very little written in the *fiqh* tradition about *ḥadd* as an expiatory act. The Ḥanafīs in particular emphasized that God specifies and legislates *ḥadd* punishments, and His “divinely decreed ordinances” are not open to juristic speculation of analogy (*qiyās*).³¹¹ However, as Lange has recently argued “[a]nalogical reasoning, they argued, is one of the accepted proofs among the “sources” of Islamic law (*ḥujja aṣliyya*), even if it cannot be considered a method used to arrive at certain knowledge (*ʿilm yaqīn*).”³¹² I argue that the Mālikīs, Shāfiʿīs and Ḥanbalīs are more flexible in justifying the *ḥadd* punishment as *kaffāra*, despite the fact that the Qurʾān does not categorize

³¹¹ By analogical reasoning I understand, as Lange in “Sins, Expiation and Non-Rationality in Ḥanafī and Shāfiʿī Fiq” explains, “[...] the intellectual process where Sunnī jurists required the jurist (*al-faqīh*) to demonstrate by a process of independent legal reasoning (*qiyās* and *ijtihād*), why certain factor of *ratio legis* (*ʿilla*) occasions the original norm (*ḥukm al-aṣl*), and with what purpose, and then to investigate whether this occasioning factor also occurs in the case under examination, that is, the novel case.”

³¹² Lange, “Sins, Expiation and Non-Rationality in Ḥanafī and Shāfiʿī Fiq”.

ḥadd punishments as *kaffārāt*.³¹³ A more nuanced differentiation between the various legal opinions about *ḥadd* punishment as *kaffāra* is necessary in order to understand the basis of the argument justifying punitive corporal and capital punishment as means of purification and expiation.

3.2 Expiation (*takfīr*) in the Islamic tradition

3.2.1 Origins and etymology

Etymologically, *kaffāra* (pl. *kaffarāt*) is an act of expiatory nature to amend for a sin committed by a Muslim. Chelhod states that *kaffāra* is derived from the root *k-f-r* which, according to him, is “undoubtedly Arabic”, conveying the meaning of covering up a thing or a person so that it is hidden from view. He argues that *kaffāra* in the Qurʾān is not primarily a blood sacrifice as is Hebr. *kappārā* in the Levitical system.³¹⁴

Abū al-Rīsh provides a fuller meaning of *kaffāra*. For him, *kaffāra* covers both material and spiritual (ritual) aspects. He claims that the concept of *kaffāra* has no comprehensive and inclusive definition, that it was not narrowly defined and that its causes were not elaborated in the *fiqh* tradition. *Kaffāra* in the Islamic tradition, according to Abū l-Rīsh, is a term that denotes an obligation upon an individual. Abū al-Rīsh defines the concept of *kaffāra* as “the name for an ordained punishment to cover the sin committed

³¹³ Lange suggests that the Shāfiʿīs who were followers of Ashʿarism broadened the scope of opportunities for the expiation of sins. He argues “It is perhaps no coincidence that works dedicated to the *kaffārāt* were written predominantly by Shāfiʿī-Ashʿarite authors.” See Lange, “Sins, Expiation and Non-Rationality in Ḥanafī and Shāfiʿī Fiq”.

³¹⁴ J. Chelhod, “Kaffāra”, *Encyclopaedia of Islam, Second Edition*, vol. iv, p. 406.

in word and deed (*ism li ‘uqūba muqaddara ‘alā irtikāb al-maḥẓūr qawlan wa-fi‘lan*)”.³¹⁵ *Kaffāra* is perceived as both a ritual act (*‘ibāda*) and a punishment incurred on account of a specific transgression (*‘uqāba*), but the aspect of punishment is more apparent and prevalent than is the ritual aspect.³¹⁶

3.2.2 *Kaffārāt* in the Qur’ān

The Qur’ān dictates a set of expiatory and propitiatory acts for a number of errors and offences. These errors and offences are as follows:³¹⁷

(1) Violations of the ritual requirements, for instance, pilgrimage (*ḥajj*), and fasting in the month of Ramadan (*ṣawm*). According to the Qur’ān (5:95), the *kaffāra* for killing animals in the state of *iḥrām* is to offer a sacrificial animal at the Ka’ba. In the case where the pilgrim is unable to sacrifice, s/he is to feed the poor or to fast. Moreover, the Qur’ān (2: 196) stipulates further expiatory acts without, however, applying the term *kaffāra*. For instance, if the pilgrim (*ḥājj*) because of illness is forced to shave his head before the day of *‘īd al-aḍḥā*, he must then fast; in the case where he is unable to fast for an illness, he is to give alms (*ṣadaqa*) or sacrifice an animal.

³¹⁵ Muḥammad Abū al-Rīsh, *Al-Kaffārāt fī Al-Fiqh Al-Islāmī* (Cairo: Maṭba‘at al-‘Amāna, 1987), pp. 11-12.

³¹⁶ Abū al-Rīsh, *Al-Kaffārāt*, p. 12.

³¹⁷ Here I follow the exact overview provided by Lange, “Expiation”, *Encyclopaedia of Islam*, 3rd, vol. II, p. 721b.

(2) Breaking oaths (*yamīn*, pl. *aymān*): According to the Qurʾān (5:89) the breaking of uttered oaths requires the *kaffāra* of feeding and clothing ten of the poor, or freeing a slave, or fasting for three days.

(3) Divorcing one's wife by uttering the words "You are like my mother's back to me" (*anti ʿalayyā ka-ḡahrī ummī*): This pre-Islamic practice, known as *ḡihār* in the Qurʾān (58:2), can be atoned for by four specific expiatory acts. In order for the husband to resume marital relations with his wife, he is to free a slave, or fast for two consecutive months, or feed sixty of the poor.

(4) Unintentional homicide: The Qurʾān (4:92) specifies three types of unintentional homicide (*qatl al-khaṭaʾ*). The term *kaffāra* is not explicitly mentioned in this context. However, the meaning is also implied. The *kaffāra* for such a sin is to free a slave and pay the blood money (*diya*) to the victim's heirs.

In addition, Qurʾān 5:45 declares the act of forfeiting one's claim to retaliation (whether in cases of homicide or injury) to be a *kaffāra*, without mentioning the offence which this specific *kaffāra* might help to expiate. The performing of *kaffāra* here is a way to accumulate merit in the eyes of God; it is therefore propitiatory in nature rather than expiatory (seeking to appease God, not to atone for a specific sin),³¹⁸ akin to other instances where the Qurʾān declares good works to compensate for evil works.

³¹⁸ According to Lange, [t]he object of expiation is sin itself, while the object of propitiation is God." See Lange, "Sins, Expiation and Non-Rationality".

Expiatory and propitiatory acts share some common aspects, and both appear concurrently in the Qurʾān and the Sunnah. However, the propitiatory acts are of a much less fixed and inflexible kind. The major difference between expiatory and propitiatory acts, however, is that an expiatory act is due as a punishment. This is unlike the propitiatory act, as the latter does not encompass the meaning of punishment entailed in the expiatory acts. *Kaffārāt* of the expiatory kind are determined and defined by God, therefore, they ought to be fulfilled as stipulated in the Qurʾān.³¹⁹ Overall, however, the Qurʾān does not provide a clear or comprehensive doctrine of atonement, but the conceptual proximity of *kaffārāt* and *ḥudūd* is already adumbrated in it: (1) (expiatory) *kaffārāt* and *ḥudūd* are divinely ordained and, therefore, immutable and fixed; (2) both are God’s rights; and (3) both are contested areas in the later *fiqh* (*al-ḥadd wa al-kaffārāt amr mukhtalaf fih*).³²⁰

3.2.3 *Kaffārāt* in the Prophet tradition (*ḥadīth*)

As stated, it does not seem possible to construct either a clear or a comprehensive doctrine of atonement on the basis of the Qurʾānic references alone. For instance, one Qurʾānic verse states that “as long as you [Muslims] abstain from major sins (*kabāʾir*) we will cover up (*nukaffir*) your sins (*sayyiʾāt*)” (4:31). This verse suggests that *kaffāra* only atones for the minor sins. However, the Prophetic tradition is replete in narrations where major sins are also said to be open to the possibility of expiation *kaffāra*. One

³¹⁹ Abū al-Rīsh, *Al-Kaffārāt fī Al-Fiqh Al-Islāmī*, pp. 20, 21.

³²⁰ Ibid., p. 24.

prominent tradition even states that “every sinful act has a *kaffāra* (li-kulli ‘amal *kaffāra*)”.³²¹ In fact, there is a significant number of *kaffārāt* listed in the Prophetic tradition ranging from rituals to misbehaviour of conduct.³²² However, in this section I restrict my examination to the *kaffārāt* of *ḥadd* offences.³²³

According to Lange, the number of expiatory acts *kaffārāt* grew over the first centuries of Islam and in fact throughout the later Middle period. As he writes, “the Qurʾān and Sunnah speak about fifty, perhaps more, expiatory *kaffārāt*. This is an estimate, however, and does not account for the issue of the authenticity of certain *ḥadīths*, or in fact for the ways in which the *fuqahāʾ* elaborated on the issue of expiation.”³²⁴ Lange argues that this growth of *kaffārāt* may be said “to have been facilitated by the lack of distinction between propitiatory acts and expiatory acts in the Muslim doctrine of atonement.”³²⁵

As for the earthly punishments for *ḥadd* offences of theft, armed robbery and illegal sexual intercourse, these are said to serve as *kaffārāt*. This, however, was initially doubted by al-Shāfiʿī, and reportedly the Prophet

³²¹ Al-Shāfiʿī, *Al-Umm*, vol. 6, p. 189.

³²² According to Lange, “[f]rom the Qurʾān, the idea of propitiatory *kaffārāt* appears to have spread into the *ḥadīth*, where one finds listed a great number of propitiatory acts, such as showing remorse (*nadāmah*), seeking religious knowledge (*ṭalab al ʿilm*), martyrdom in *jihād*, fasting, frequent and extended visits to the mosque and, especially, proper ablutions and prayer”. See Lange, “Sins, Expiation and Non-Rationality”.

³²³ For more about the different types of *kaffārāt* see: Lange, “Expiation”, *Encyclopaedia of Islam, Three*.

³²⁴ Lange, “Sins, Expiation and the Non-Rationality”.

³²⁵ *Ibid*.

himself had said that he did not know “whether or not the *ḥudūd* are *kaffārāt* for those who are punished with them.”³²⁶ As for the punishment of unlawful sexual intercourse (*zinā*), the Prophetic tradition tells of the stories of Māʿiz and al-Ghāmidiyya. Both reportedly confessed to their crime of *zinā*. The Prophet would have praised their repentance and told them that the stoning would expiate their sin.³²⁷ As for the punishment of theft, it is reported in the Prophetic tradition that the Prophet ordered a thief’s hand to be amputated and requested the thief to be brought back to him. The Prophet is believed to have asked the thief to repent, and to have said: “God, forgive him and accept his repentance.”³²⁸

3.2.4 *Kaffārāt* in Islamic jurisprudence (*fiqh*)

3.2.4.1 *Ḥadd* punishments as *kaffārāt* in *fiqh* textbooks

In general, the concept of *kaffāra* (pl. *kaffārāt*) is not dealt with in a separate chapter devoted to this subject in *fiqh* textbooks. Instead, the *kaffārāt* are discussed in a number of different chapters, such as the chapters on prayer, pilgrimage, fasting in the month of Ramaḍān, homicide, and in the breaking of oaths, etc.³²⁹ According to Lange, “most works specifically dedicated to the *kaffārāt* appear to be a late, post 6th/12th century phenomenon and to deal exclusively with the propitiatory type of *kaffārāt*,

³²⁶ Al-Shāfiʿī, *Al-Umm*, vol. 6, p. 190.

³²⁷ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, pp. 107, 108-9.

³²⁸ Al-Shīrāzī, *Al-Muhadhdhab*, vol. 5, pp. 446-7; al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 167-8.

³²⁹ Cf. Al-Sarakhsī, *al-Mabsūṭ*, vol. 9, pp. 107, 108-109; vol. 3-4, pp. 152-3; vol. 7-8, p. 132.

promising forgiveness for ‘former and future sins’.”³³⁰ As he notes, the propitiatory *kaffārāt*, however, are not legally relevant – they are too unspecific for this, promising forgiveness for sins that remain unspecified.

Muslim jurists regard *kaffāra* as a specific type of punishment stipulated in the Qurʾān against crimes regarded as severe transgressions. It is in the *fiqh* tradition where jurists expanded and circumscribed the basic provisions about *ḥadd* punishments as expiatory acts as laid down in the *Sunnah*.³³¹ The Ḥanafis are the exception, showing reluctance in accepting *ḥadd* punishments as *kaffārāt*. The Ḥanafis’ position is explained by the fact that the *kaffārāt* are not explicitly mentioned in revelation and that the Ḥanafis reject analogical reasoning in all norms “decreed by God”, which include the *ḥadd* punishments as well as the *kaffārāt*.³³² This rests on the fact that analogy (*qiyās*) is a legal method that implies reasoning in which a residue of doubt always exists; thus, it cannot be applied to the *kaffārāt* because the *kaffārāt* are classified as punishments, and punishments may and cannot be adjudicated in the presence of doubt (Cf. ch. 1). The numerical aspects of *ḥadd* punishments (the number of lashes for example, or the time span stipulated for banishment) are known only through the Qurʾān and the *Sunnah*, but cannot be apprehended through use of legal reasoning. According to the Ḥanafis, the occasioning factor (the *‘illa*, or *ratio legis*) of the

³³⁰ Lange, “Expiation”, vol. II, p. 721b.

³³¹ Cf. Lange, *Justice, Punishment and the Medieval Imagination*, p.

³³² Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 41; Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 5, pp. 251-2.

kaffārāt cannot be known due to the *kaffārāt*'s non-rational nature.³³³ The Ḥanafīs hold that, since the Qurʾān does not stipulate that *ḥadd* punishment constitutes *kaffāra*, this can be established neither by analogy nor by some other form of *ijtihād*. Applying the *kaffārāt* solely on the basis of independent legal reasoning, without an explicit ordination (*naṣṣ*), is rejected altogether.

The Shāfiʿīs, Mālikīs and Ḥanbalīs, on the contrary, agreed on the general permissibility of analogical legal reasoning in all domains of law, including the *kaffārāt* and *ḥadd* punishments. Muslim jurists of these schools tended to regard the *kaffārāt* as a type of punishment (*ʿiqāb*), incurred on account of a transgression (*maʿṣiya*).³³⁴

3.2.4.2 How did the *ḥadd* punishments come to be regarded as *kaffārāt*?

As I have noted above, the Ḥanafīs refuted the view that *ḥadd* punishment serves as an act of expiation for sins (*kaffāra*), as they only accepted *kaffārāt* as defined in the Qurʾān and Sunnah. They could adduce certain *ḥadīths* according to which the Prophet inflicted the punishment *and* requested the culprits to repent their sin – in order to argue that punishment alone was not enough to exculpate the offender: “A man confessed that he committed theft and was brought to the Prophet for a verdict. The Prophet

³³³ Lange, “Expiation”, p. 721b.

³³⁴ Al-Shāfiʿī, *Al-Umm*, vol. 6, p. 190; Al-Ramlī, *Nihāyat al-muḥtāj ilā sharḥ al-minhāj*, vol. 8, pp. 8-9; Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 93; al-Qarāfī, *Al-Dhakhīrah*, vol. 9, p. 418.

ordered his hand to be amputated. The thief's hand was amputated and the Prophet asked him to repent.”³³⁵

According to the Mālikīs, Shāfi'īs and Ḥanbalīs, *ḥadd* punishments were explained (and thereby, arguably, justified) as acts of an expiatory nature to amend for sins outlined in the Qur'ān and Sunnah. While the Qur'ān says nothing about the expiatory function of *ḥadd* punishment, heavy recourse was made to a number of Prophetic *ḥadīths* according to which the Prophet declared *ḥadd* punishments to be *kaffārāt*. One of the most often cited narrations endorsed by Mālikīs, Shāfi'īs and Ḥanbalīs is a tradition traced back to the Companion Ibn 'Ubāda al-Ṣāmit, who narrated that:

We gave the oath of allegiance, that we would not join partners in worship besides God, would not steal, would not commit illegal sexual intercourse, would not kill a life which God has forbidden, would not commit robbery, and would not disobey God and His Messenger, and if we fulfilled this pledge we would have paradise, but if we committed any one of these [sins], then our case will be decided by God.³³⁶

This narration seems theologically problematic because it is clearly inconsistent with the Qur'ānic view on what is widely held to be one of the gravest sins in Islam, that is, setting up partnership with God, or *shirk*.³³⁷ According to the Qur'ān, God forgives any sin *except shirk*. In fact, *shirk* is the

³³⁵ Al-Nasā'ī, *Sunan*, vol. 2, p. 793.

³³⁶ Al-Bukhārī, *Ṣaḥīḥ*, vol. vi, p. 7; Muslim, *Ṣaḥīḥ*, vol. 2, p. 742; Al-Tirmidhī, *Sunan*, vol. 1, p. 390.

³³⁷ For a fuller entry on the Qur'ānic concept of *shirk*, see: D. Gimaret, “Shirk”, *Encyclopaedia of Islam, Second Edition*, vol. ix, p. 484b.

only unforgivable sin: “Verily, God forgives not [the sin of] setting up partners [in worship] with Him, but forgives whom He wills, sins other than that, and whoever sets up partners in worship with God, has indeed strayed far away” (4:116). It is not clear, in this context, how Muslim jurists managed to reconcile the narration attributed to the Prophet with this particular Qurʾānic verse. The commentaries on this particular narration concentrate on the expiatory aspect of the *ḥadd* punishment.³³⁸ The narration together with its standard commentary suggests that even those who commit *shirk*, if they are punished with *ḥadd* punishment, are excused and forgiven.

A similar narration is attributed to the Prophet through his cousin ʿAlī. ʿAlī is reported to have related that the Prophet said:

He who sins in this life and was punished for it, God is far more just than to combine two punishments on His servant. He who commits an error in this life and God hides his error and pardons him, then God is far more generous than to punish the servant for something that He has already pardoned.³³⁹

The Imām al-Shāfiʿī, however, was not sure whether the *ḥadd* punishment would in fact expiate the culprit in the hereafter. The Shāfiʿīs did not claim certainty about the *ḥadd* punishment, that is, whether it constitutes expiation. Nonetheless, it appears that al-Shāfiʿī, or at least the later adherents of his school, gradually came to agree with the Mālikīs and

³³⁸ Ibn Kathīr, *Tafsīr* (Lahore: Darussalam, 2000), vol. 5, p. 165

³³⁹ Ibn Kathīr, *Tafsīr*, p. 165.

Ḥanbalīs on this point.³⁴⁰ The Ḥanbalīs used to quote a *ḥadīth* from the Prophet according to which he ordered a woman named al-Juhayniya to be stoned for committing illegal sexual intercourse. It is reported that, after stoning al-Juhayniya, ‘Umar Ibn al-Khaṭṭāb questioned the Prophet about his participation in her funeral. The Prophet is reported to have responded by saying: “Have you not seen anything better than she gave her soul to God?” (*wa-hal wajadata afḍala min an jāddat bi-nafsihā*).³⁴¹

The Ḥanbalī Ibn Qudāma cites another narration from the Prophet:

A man named ‘Amrū b. Samra b. Ḥabīb came to the Prophet confessing that he had stolen a camel from a tribe he named. The Prophet sent a messenger to the tribe asking about the stolen camel. The tribe confirmed that the camel had been stolen. Then the Prophet ordered the thief’s right hand to be amputated... ‘Amrū b. Ḥabīb, when he saw his amputated hand, commented: “Thanks to God that He purified me from the hand that committed theft and which could have led me to hellfire”.³⁴²

Interestingly, the Ḥanafīs and the Shāfi‘īs endorsed almost the same Prophetic *ḥadīths*; however, their interpretations of these narrations vary significantly, because they applied different methods of interpretation that sometimes resulted in opposing outcomes. This tension among the legal schools in regard to justifying *ḥadd* punishments as expiatory acts will be discussed in the next section.

³⁴⁰ Al-Qarāfi, *Al-Dhakhīrah*, vol. 9, p. 399.

³⁴¹ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 44.

³⁴² Ibn Qudāma, *Al-Mughnī*, vol. 9, pp. 122-3.

3.3 Legal debates about *ḥadd* and repentance (*tawba*)

3.3.1 The Ḥanafī view

The disagreement among the jurists about *ḥadd* as *kaffāra* began, arguably, when the Ḥanafī jurists restricted their analogical reasoning to the cases not listed as the “things decreed by God”.³⁴³ Since *ḥadd* punishments are among the “things decreed by God”, the Ḥanafīs refused to interfere in them by way of *ijtihād*.³⁴⁴ Instead, the Ḥanafīs argued that repentance (*tawba*) of *ḥadd* offences, for example in cases where confession is obtained, was the only means to amend and atone for the committed sin. This argument is consistent with their special treatment of *ḥadd* punishments as the “things decreed by God”. Since *ḥadd* punishments are not declared *kaffārāt* in the Qurʾān, the Ḥanafī jurists clearly did not have the Qurʾānic foundation to include *ḥadd* punishments in the list of *kaffārāt*; and one of the characteristics of their school was that they remained skeptical vis-à-vis the authority of Prophetic *ḥadīth* in jurisprudence, thus ending up with no explicit *naṣṣ* to argue for the status of *ḥadd* as *kaffāra*.

³⁴³ Lange in “Sins, Expiation and the Non-Rationality” scrutinizes the underlying reasons that prevented the Ḥanafī jurists from treating the things decreed by God (i.e., *kaffārāt*) as susceptible to analogical reasoning of *qiyās*. In his words “This [refusing to apply analogy to *kaffārāt*] was because all Sunnī jurists agreed that *qiyās* and *ijtihād* could arrive only as a result of probabilistic knowledge (*ʿilm ḡanī*). In order for a jurist to achieve certainty (*yaqīn*), that is, knowledge beyond doubt (*yaqīn muṭlaq*), this always requires neither errors nor doubts and the only source without errors or doubts is the divine revelation (Qurʾān) and the sound Sunnah.”

³⁴⁴ According to Lange “[f]ew, if any, exhaustive lists of *muqaddarāt* appear to be in Sunnī legal literature.” He refers to the most complete list as being found in al-Nawawī, *al-Majmūʿ Sharḥ al-Muhadhdhab*. See Lange, *Justice, Punishment and the Medieval Muslim Imagination*, 184.

The Ḥanafis however did cite a number of Prophetic narrations where the culprits had willingly confessed their crimes (for the Ḥanafis, a sure sign of their repentance, or *tawba*) and were later announced by the Prophet himself to have been granted the forgiveness they sought. Particularly the *ḥadīths* about Mālīk and al-Ghāmīdiyya were frequently quoted in the Ḥanafī legal textbooks. They cited the Prophetic response to the stoning al-Ghāmīdiyya, namely, that “she repented, and if her repentance is to be distributed among the *ummah* it will be sufficient.”³⁴⁵ According to another narration the Prophet condemned the Companion Khālīd b. al-Walīd for cursing her and is reported to have said: “Do not curse her as she repented (*tābat*) and she is forgiven!”³⁴⁶

Let us recall that other interpretations of this *ḥadīth* were possible. The Ḥanbalī Ibn Qudāma, for example, argued that when the Prophet said to Mālīk and al-Ghāmīdiyya that they were forgiven it was because they requested to be purified from their sins. “This is because *ḥadd* is *kaffāra*, and repentance (*tawba*) does not negate the [expiatory power of the] punishment.”³⁴⁷ Ibn Qudāma understood the purification in this particular narration to be achieved through the capital punishment of stoning, and not by the contrition al-Ghāmīdiyya had shown upon her request to be purified from the sin.

³⁴⁵ Muslim, *Ṣaḥīḥ*, vol. 2, p. 737.

³⁴⁶ Muslim, *Ṣaḥīḥ*, vol. 2, 737; Abī Dāwūd, *Sunan*, vol. 2, p. 743.

³⁴⁷ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 130.

The Ḥanafīs cited another Prophetic *ḥadīth* which they regarded as a proof (*dalīl*) for the position that repentance is the only means to achieve atonement and expiation for the committed offenses. According to the *ḥadīth* in question, a thief confessed to his theft offence and had his right hand amputated as a result. The thief was then brought back to the Prophet and was asked by the Prophet to repent his sin. The man said that he repented and the Prophet is reported to have said: “O God forgive him, and accept his repentance.”³⁴⁸ Al-Sarakhsī remarks that the Prophet asked the thief to repent even *after* he was punished. This is proof that atonement for the sin or crime is not achieved or fulfilled by the amputation per se, but through repentance alone.³⁴⁹

Ḥanafī jurists were reluctant to accept the idea that *ḥadd* punishments in themselves, in cases proven by either testimony or confession, were the key to atonement for sins. The Ḥanafī jurist Ibn Nujaym noted that Sunnī jurists disagreed as to whether purification from sin without repentance is one of the consequences of *ḥadd* punishment (*ikhtalafa al-‘ulamā’ fī-anna l-tuḥra min al-dhanb min aḥkāmihī min ghayr tawba*).³⁵⁰ According to Ibn Nujaym, the majority of the Ḥanafī jurists agreed that purification from sin by way of punishment was in fact not one of the *aḥkām* (norms) of *ḥadd*. Thus, if the punishment was inflicted without the culprit repenting from his offence, the sin was not atoned for; only direct Qur’ānic evidence could have

³⁴⁸ Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 168.

³⁴⁹ Ibid.

³⁵⁰ Ibn Nujaym, *Al-Baḥr al-rā’iq*, vol. 5, p. 4.

convinced them of the opposite.³⁵¹ This opinion rests on the fact that the Qurʾān unequivocally guarantees only the bandits of the *ḥirāba* crime the chance to repent, and therefore, their punitive *ḥadd* punishment is dismissed (5:34). This is of course, according to all Sunnī jurists, when repentance is obtained prior to being captured by the Muslim authority (Cf. ch. 1).

Al-Sarakhsī elaborated further on this matter, arguing that the *ḥadd* punishment was either a disgrace (*khizy*) or a punishment by way of example (*nakāl*) (Cf. ch. 2). In order for the culprit to be purified from the sin committed, he ought to sincerely repent. Genuine repentance, according to the Ḥanafīs, is the one in which there is contrition and sincere determination not to commit the same offence again (*tamām al-tawba bi-l-nadam ‘alā mā kāna minhu wa-l-‘azma ‘alā an lā ya‘ūda ilayhi min ba‘d*).³⁵² Needless to say perhaps, this repentance has to occur before the punishment is inflicted, at least where the punishment is a capital punishment, because the culprit will not be given a chance to repent and show remorse for his wrongdoing. Those who are punished with corporal punishment retain the option to repent and the chance to show remorse thereafter. The Ḥanafīs talk about the opportunity for culprits who are to be punished by a capital punishment to show contrition before they are executed; this, then, demonstrates that they have regretted their sin.

3.3.2 The Shāfi‘ī view

³⁵¹ Ibid.: *idhā uqīma ‘alayhi al-ḥadd wa-lam yatub lam yasquṭ ‘anhu ithm al-ma‘ṣiya*.

³⁵² Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 168.

Contrary to the Ḥanafīs, the Shāfi‘ī is held that *ḥadd* punishments are *kaffārāt* to amend for *ḥadd* offences.³⁵³ This opinion rests on a *ḥadīth* according to which the Prophet said that “whoever commits something of such sins [*ḥadd*] and receives the legal punishment for it, that will be considered as the expiation for that sin.”³⁵⁴ This narration led the Shāfi‘ī jurist al-Ramlī to state: “There is a benefit from having the *ḥadd* punishment inflicted as it will result in having the hereafter’s punishment dropped.”³⁵⁵ Al-Shāfi‘ī commented on this narration: “I have not heard of any narration on *ḥudūd* that is more explicit than this one (*wa lam asma‘ fī-l-ḥudūd ḥadīth abyan min hādhā*).”³⁵⁶

However, al-Shāfi‘ī also endorsed another Prophetic narration according to which the Prophet doubted that *ḥadd* punishment would expiate the culprits’ sins. The Prophet is reported to have said that “Who knows, *maybe (la‘alla)* the *ḥudūd* were revealed to expiate the sins [my emphasis]”.³⁵⁷ Repentance, in this perspective, seems to have a more significant function in atoning for the *ḥadd* offense that was committed. Another of al-Shāfi‘ī’s opinions appears to point in the same direction. Al-Shāfi‘ī preferred that, if

³⁵³ In contradistinction to the Ḥanafīs’ position on the inapplicability of legal reasoning to the things decreed by God (i.e., *kaffārāt*), Lange in “Sins, Expiation and the Non-Rationality” argues that the Shāfi‘ī doctrine of applying legal analogy constitutes correct procedure in all legal issues including *ḥudūd* norms. Lange offers clear elaborations on why and how the Shāfi‘īs did not see any theological factors that precluded them from applying analogy, and thus, for them as Lange argues “there is no such obstructing factor [to apply analogy] in the divinely ordained punishments or expiatory acts.”

³⁵⁴ Al-Shāfi‘ī, *Al-Umm*, vol. 6, p. 189.

³⁵⁵ Al-Ramlī, *Nihāyat al-muḥtāj*, vol. 8, pp. 8-9.

³⁵⁶ Al-Shāfi‘ī, *Al-Umm*, vol. 6, p. 190.

³⁵⁷ Ibid.

someone commits a *ḥadd* offence, he should hide it and not confess it. The culprit is to regret and repent the offence he committed and never to commit the same crime again “because God accepts repentance from the wrongdoers (*naḥnu nuḥibbu li-man aṣāba l-ḥadd an yastatira wa-an yattaqī Allāh wa-lā yaʿūda li-maʿṣiyat Allāh fa-inna Allāh yaqbalu al-tawba min ʿibādihi*).”³⁵⁸

To the best of my knowledge, al-Shāfiʿī never reconciled these two contradictory tendencies. It seems that he did not validate one of the two at the expense of the other, but lived with the tension that obtained between them. In the meantime the Ḥanafīs, in remaining faithful to their basic premise, argued that the narration in which the Prophet expresses doubt that *ḥadd* punishments expiate sins aims at those who repented and showed remorse while the punishment was inflicted.³⁵⁹

Unlike for the Ḥanafīs, and despite al-Shāfiʿī’s hesitation in the matter, repentance for the Shāfiʿīs did not become the pivotal point in discussions about the expiating power of *ḥadd* punishments. The first reason was that the Prophet Muḥammad was reported to have himself inflicted the *ḥadd* punishment, despite the fact that the culprits repented and showed contrition, that is, in the cases of Māʿiz and al-Ghāmidiyya. The Shāfiʿīs highlighted narrations according to which the Prophet inflicted the punishments despite the fact that those punished had repented of their crimes. Al-Ramlī held that “*ḥadd* offences, that is, illegal sexual intercourse, theft, consuming alcohol, are not dismissed by repentance and this is evident

³⁵⁸ Al-Shāfiʿī, *Al-Umm*, vol. 7, p. 250.

³⁵⁹ Ibn Nujaym, *Al-Baḥr al-rāʾiq*, vol. 5, p. 4.

because the Prophet inflicted the *ḥadd* punishment even on those who repented.”³⁶⁰ He argued that “whoever is punished for the *ḥadd* in this world, he is not punished for it in the hereafter, unless he insisted on re-committing the *ḥadd* offence and does not repent.”³⁶¹

The second reason was related to the concept of *tawba* (repentance) and its forms.³⁶² According to the Shāfi‘ī and Ḥanbalī doctrine, there are two types of repentance. The first is insincere repentance (*tuqya*), namely, showing self-mortification to escape the *ḥadd* punishment. This is similar to confessing to Islam under the sword. The second type of repentance is genuine repentance, which is open manifestation of contrition made evident by reform. A period of time is required in order to reform and show that rehabilitation has in fact taken place. According to the Shāfi‘īs and Ḥanbalīs, the problem is imbedded in the uncertainty of recognizing genuine repentance, particularly when the crime is brought before the judge. For the Shāfi‘īs, in other words, punishment was ‘enough’ to ensure expiation (*takfīr*); arguably, however, this also meant that they were keener to implement

³⁶⁰ Al-Ramlī, *Nihāyat al-muḥtāj*, vol. 8, p. 8; Al-Shāfi‘ī, *Al-Umm*, vol. 6, p. 367.

³⁶¹ Al-Ramlī, *Nihāyat al-Muḥtāj*, vol. 8, p. 8.

³⁶² Rubin writes about the post-Qur’ānic literature on repentance: “As for repentance in post-Qur’ānic literature, a good overview can be gained from Ibn Qudāma’s (d. 690/1291) *Kitāb al-Tawwābīn*. Apart from chapters revolving around the Qur’ānic instances of repentance, there are also numerous chapters containing edifying folk tales praising the pious repentance of figures from among the Children of Israel, as well as from the pre-Islamic Arabs. Further, there are also traditions about Companions of the Prophet and other ascetics of the first Islamic eras.” Cf. Uri Rubin, “Repentance and Penance”, *Encyclopaedia of the Qur’ān*, vol. 4, p. 426a.

punishment than the Ḥanafīs, who emphasized the aspect of repentance over the suffering of punishment.

According to al-Ghazālī, “repentance which is required of Muslims is the abandoning of any action which violates the religious law and resolving not to commit a similar act in the future [...] the Muslim must atone for his sins in the special way prescribed by the religious tradition.”³⁶³ He suggests that repentance along with the punishment prescribed by the religious tradition constitutes *kaffāra*. This is consistent with the Shāfi‘ī’s doctrine, namely their refusal to waive the *ḥadd* punishment when repentance occurs.³⁶⁴ According to the Shāfi‘ī, repentance never preempts *ḥadd* punishment, except in *ḥirāba*.³⁶⁵ But, if repentance does not negate the *ḥadd* punishment in this world, why would it preempt the punishment in the hereafter? Perhaps here is the root of al-Shāfi‘ī’s hesitation in the matter.

Al-Nawawī is a good example of a Shāfi‘ī jurist who stresses the fact that it is hard to determine the sincerity of the culprit’s repentance. “It is impossible to know the truth of it”, he writes, “so how is one to know whether he [the culprit] is reformed? (*lā sabīla ilā ḥaqīqatihi fa-kayfa yu‘rafu iṣlāḥuhu*)”.³⁶⁶ Al-Nawawī points out that the legal disagreement about repentance, its accountability and validity, occurs because repentance can only be established securely if the culprit is granted sufficient time to show

³⁶³ Mohamad Ahmed Sherif, *Ghazālī’s Theory of Virtue* (Albany: State University of New York Press, 1975), p. 125.

³⁶⁴ Cf. Chapter one: 1.4.2.3.

³⁶⁵ Al-Shāfi‘ī, *Al-Umm*, vol. 6, p. 367.

³⁶⁶ Al-Nawawī, *Rawḍat al-ṭālibīn*, vol. 7, p. 368.

his reform and for his reformation to be assessed;³⁶⁷ however, if the judge gives the culprit the required time to repent, then the *ḥadd* law is virtually inoperative (*mu‘aṭṭal*), and this goes against the general spirit of *ḥadd* punishments.

Al-Shīrāzī argued that Qurʾān 4:16 and 5:39 stipulate that repentance has to come with reform, since anyone can pretend repentance for the sake of avoiding severe punishment.³⁶⁸ Al-Shīrāzī suggested that repentance must be endorsed through good deeds and visible reform. This is because Qurʾān 4:16 stipulates that “if they repent... and do good works, leave them alone... Surely God is ever all-Forgiving and most Merciful”.

In theory, the Shāfi‘ī jurists did not deny the judge the role to discern the sincerity of the culprit and the extent of his true reform, nor did they deny the role of repentance in gaining forgiveness in the hereafter. However, on the practical level, repentance had no legal implications, and therefore the sincerity of repentance was ultimately left to God to judge on the Day of Judgement.³⁶⁹

3.3.3 The Ḥanbalī and Mālikī view

Like the Shāfi‘īs, the Ḥanbalīs and the Mālikīs thought that it was problematic to regard repentance as *kaffāra* and instead focused on ensuring that corporal and capital punishment is implemented as an expiatory act. The

³⁶⁷ Al-Nawawī, *Rawḍat al-ṭālibīn*, vol. 7, p. 368: *al-tawba ba‘d al-raḥ al-takfī fī isqāṭ al-ḥadd li-annahu lā budda min maḍy zamān ḥattā yaẓharu al-ṣidq min tawbatihī*.

³⁶⁸ See al-Ramlī, *Nihāyat al-muḥtāj*, vol. 8, p. 8. Al-Ramlī repeats and supports this position.

³⁶⁹ Ibid.; al-Qarāfī, *Al-Dhakhira*, vol. 9, pp. 453-4.

Ḥanbalī Ibn Qudāma validated repentance only when it is incurred before the crime is brought before the judge: this he regarded as an indication that the repentance was genuine. However, if it happened afterwards, he felt it was most likely a case of insincere repentance (*tuqya*).³⁷⁰ Furthermore, the Ḥanbalīs provided no further elaboration on what made them consider repentance as *genuine* only when it occurs before the case is brought to the Muslim judge. In other words, what was the juristic criterion to presume that “genuine” repentance is only *valid* before the culprit is brought to the judge and that the obtained repentance after the culprit is brought to the judge makes him *suspicious* (i.e., by submitting *un-genuine* repentance) is not systematically discussed in the Ḥanbalī tradition.

However, showing a more flexible approach than the Shāfi‘īs, Ibn Qudāma argued that to assess the sincerity of the culprit’s repentance is not limited by time to a certain period (*ṣalāḥ al-niyya laysa muqaddar bi-mudda ma‘lūma*).³⁷¹ Overall, however, the Ḥanbalīs were as reluctant as the Shāfi‘īs to accept that repentance in itself is enough to expiate the culprit from punishment, both worldly and eschatologically. They let themselves be guided by the fact that the *ḥadd* punishments are more often talked about in the Qur’ān and the *Sunnah* than is repentance and its various forms and conditions. For the Ḥanbalīs, to allow repentance to preempt punishment, especially after the crime is brought before the judge, undermines the general principle of *ḥadd* punishment as the fixed and immutable law of God (Cf. ch.

³⁷⁰ Ibn Qudāma, *Al-Mughnī*, vol. 9, p. 130.

³⁷¹ *Ibid.*, p. 131.

1). Since repentance does not negate the worldly punishment, the *ḥadd* inflicted, therefore, is viewed as *kaffāra* from eschatological punishment.

Finally, as for the Mālikīs, they too rejected that repentance can preempt *ḥadd* punishment for crimes such as illegal sexual intercourse, theft and false accusation of illegal sexual intercourse. Al-Khurashī rejected repentance in the aforementioned crimes and did not give any importance to the time given to the culprit to show remorse and repentance.³⁷² This opinion rests on the Mālikīs' approach to *ḥadd* punishments as defined in the Qurʾān and the practice of the Prophet. Al-Qarāfī argued that, in the light of the Qurʾānic *ḥadd* verses and the various opinions of the Prophet about the issue, one should follow the opinion that the suffering of the *ḥadd* punishment is the act of expiation (*kaffāra*) and not the culprit's repentance.³⁷³ Overall Mālikīs paid little attention to repentance, its aspects and forms. Interpreting the Prophetic tradition on *ḥadd* punishment as the only way to expiate the culprit is the central argument of the Mālikīs. The Qurʾānic *ḥadd* verses in addition to the Prophetic tradition seem to endorse their argument that *ḥadd* deters and expiates the culprit.

³⁷² Al-Khurashī, *Ḥāshiyat* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), vol. 8, p. 332: *lā yasquṭu ḥadd l-sariqa wa-l-zinā wa l-qadhḥ bi-l-tawba wa-lā bi l-ʿadāla wa-in ṭāla zamānuhumā*.

³⁷³ Al-Qarāfī, *Al-Dhakhira*, vol. 9, p. 414.

3.5 Conclusion

In conclusion, despite the fact that there is a clear absence of systematic interest of Sunnī jurists with regard to the classification of the expiatory acts, *ḥadd* punishments were classified in the Sunnī tradition as forming as the result of a transgression incurred against offences forbidden in the Qurʾān. There was a tendency among Sunnī jurists to view *ḥadd* punishments simply as that – that is, as legal punishments –, and not as religious rituals. The consensus of Sunnī jurists was that *ḥadd* punishments were to be subsumed under the *muqaddarāt* and characterised by the imposition of a decreed norm without specification of either the concrete reason or the larger purpose (*ḥikma*) that lies behind the divine norm. Thus, the *ḥadd* punishments were viewed as *muqaddarāt*, that is, “things specifically defined and decreed”.

It has been shown in this chapter that the point of contention among Sunnī jurists was to determine the nature of the things decreed by God and, specifically, whether the human has the capacity to apprehend them. The Ḥanafī school of law rejected regarding the *ḥadd* punishment as expiating the culprit from punishment in the hereafter and instead, discussed the role of repentance as the only means to expiate worldly sins. While the Ḥanafīs argued that the divinely ordained punishments served the greater good of humankind (cf. chapter one), they rejected that they served an atoning function for the individual. The Ḥanafīs also claimed that the divinely ordained punishments were meant as a retribution for sins, but that only God knew the precise gravity of sin.

The Shāfi‘īs, Mālikīs, and Ḥanbalīs, on the contrary, consistently held that the *ḥudūd* are *kaffārāt*; they thus justified the severe punishments inflicted in the law of *ḥadd* as *kaffārāt*, along with the other justifications of *ḥadd* that they proffered, that is, *ḥadd* as the right of God and as deterrence. The Ḥanafīs restricted their justifications of the severity of *ḥadd* punishment to either preserve a right of God, or to generally and individually prevent people from committing *ḥadd* offences. To suggest that *ḥadd* punishments double up as *kaffārāt* was not one of the Ḥanafīs’ argument to justify them. The Ḥanafīs argued that desisting from the *ḥadd* offence was demanded in all *ḥadd* verses that promise to reward those who desist, and a *ḥadd* punishment for those who insist on committing forbidden offences.

The Ḥanafī jurists consistently held that the occasioning factor (*‘illa*) of *kaffārāt* norms could not be known due to the *kaffārāt*’s non-rational nature. As one type of the *muqaddārāt* (others include, notably, the *ḥudūd*), the *kaffārāt* “escape the human faculty of reasoning”. This argument is critically discussed in Lange’s account on *Justice and Punishment, and the Medieval Imagination* (2008) “[...] it could be argued that all legal regulations of *ḥudūd* norms that came to be subsumed under the loose category of *muqaddārāt* have one important feature in common: they all illustrate God’s incomprehensible purpose in connecting what man calls “cause” with what man calls “result”.³⁷⁴ The Shāfi‘īs, Mālikīs and Ḥanbalīs, on the other hand, insisted on the general permissibility of analogical reasoning in all domains

³⁷⁴ Lange, *Justice, Punishment and the Medieval Muslim Imagination*, p. 188.

of the law, including the *kaffārāt*. In Lange's words "[...] the Shāfi'īs did not hesitate to embrace analogy in the *muqaddarāt*."³⁷⁵ According to all Sunnī schools of law, except the Ḥanafīs, *kaffāra* was conceived as one of the mechanisms, next to repentance and God's free exercise of mercy, that assure forgiveness, and therefore salvation, despite a sinful act.

Shāfi'ī and Ḥanbalī jurists were inclined to regard *ḥadd* punishments as a means of expiation and atonement. In their legal treatises, they devoted sections about *ḥadd* punishments serving as *kaffārāt* (*bāb anna l-ḥudūd kaffārāt*); this was based on a Prophetic report according to which the Prophet said that

whoever among you commits something of such sins [*ḥadd* offences] and receives the legal punishment for it, that will be considered as the expiation for that sin; and whoever commits something of such sins and God screens him, it is up to God whether to excuse or punish him.³⁷⁶

As noted above, al-Shāfi'ī's response to this narration was: "I have not heard in reference to God's *ḥudūd* any more decisive report than this report (*wa-lam asma' fī l-ḥudūd ḥadīthan abyana min hadhā*)."³⁷⁷ Al-Nawawī, commenting on al-Shāfi'ī's statement, opined that "this is a decisive response to those who said that the *ḥadd* punishments are deterrents (*zājirāt*) and not

³⁷⁵ Ibid, p. 191.

³⁷⁶ Al-Bukhārī, *Ṣaḥīḥ*, vol. 3, p.509.

³⁷⁷ Al-Shāfi'ī, *Al-Umm*, vol. 6, p. 190.

acts that expiate sins (*mukaffirāt*).³⁷⁸ In conclusion, it has to be said that the majority of classical Sunnī jurists agreed with al-Nawawī.

³⁷⁸ Ibid.: *hādhā ṣariḥ fī al-radd ‘alā man qāla anna l-ḥudūd zājirāt lā mukaffirāt*.

Chapter 4: Modern views of traditional justifications of *ḥadd* punishments

4.1 Introduction

In Part I of this thesis, I examined a number of strategies for the justification of the *ḥadd* punishments in Islamic jurisprudence (*fiqh*). Part II looks at modern and contemporary debates about *ḥadd* and consists of two chapters. In Ch. 4, I attempt to critically evaluate the basic outlines of modern Muslim debate about the justifiability of *ḥadd* punishments, highlighting to what extent modern positions echo, attack or simply sidestep classical *fiqh* positions.

For the purpose of analysis, I divide debates in reference to *ḥadd* punishments into four main camps of Muslim scholars. Each camp is defined and classified on the basis of the approaches and attitudes it brings to the transmitted knowledge of the Islamic legal tradition (Qurʾān, *sunnah*, *fiqh*). The chapter attempts to introduce a basic typology of modern and contemporary strategies for the justification of *ḥadd* punishments.

This chapter is divided into three main sections. Section 1 aims to describe, as objectively as possible, the various methods and approaches in the modern and contemporary Muslim debate about *ḥadd* laws and the justification for their punishments. The second section aims to evaluate the relevance of classical jurisprudence (*fiqh*) for contemporary Muslim discourse

about the justifications of *ḥadd* punishments. Finally, section 3 aims to outline and delineate the differences and the commonalities between the four camps of contemporary Muslim scholars.

4.2 The four contemporary camps: definitions and approaches

Johnston suggests that “to read and interpret one’s sacred texts in the light of changing sociopolitical realities – as in writing about ‘Islam’ and human rights, for instance – is a case of simply ‘doing theology’.”³⁷⁹ Muslim jurists who articulate their views of Islamic law based on their understating of the Qurʾān and the transmitted tradition of the Prophet are obviously engaging in Islamic theology. Islamic law for contemporary Muslim scholars is “a project always undertaken in a particular context and necessarily assuming a particular hermeneutic (theory of textual interpretation) and epistemology (theory about what we can know and how we come to know it)”.³⁸⁰

This section deals with the basic methods and approaches applied by modern Muslim scholars. I focus here on how contemporary scholars relate their work to the Islamic tradition (Qurʾān, Sunnah, *ijmāʿ* and *fiqh*), which elements of it they embrace and which elements they reject, and which trends exist *within* the four major groups. These four camps are as follows: the Salafis, conservatives, traditionalists, and modernists.

³⁷⁹ David L. Johnston, “Maqāṣid Al-Sharīʿah”, *Die Welt des Islams* 47, 2 (2007), p. 150.

³⁸⁰ *Ibid.*, p. 150.

4.2.1 The Salafis/fundamentalists' approach (*al-uṣūliyyn*)

Scholars of the Salafi approach tend to value a strict and literal interpretation of the Qurʾān, the Prophetic teachings, as well as the practice of the early pious Muslims (*ṣaḥāba*). According to a Prophetic *ḥadīth*, “the best of mankind is my generation, then those who come after them, and then those who come after them”.³⁸¹ According to the *Encyclopaedia of Islam*, Salafism is “a neo-Orthodox brand of Islamic reformism, originating in the late 19th century and centered in Egypt, aiming to regenerate Islam by a return to the tradition represented by the pious forefathers (*al-salaf al-ṣāliḥ*) of the primitive faith”. The entry continues:

It is worth mentioning that in modern times the word has come to have two dissimilar definitions. The first, used by academics and historians, denotes a school of thought which surfaced in the second half of the nineteenth century as a reaction to the spread of European ideas, and sought to expose the roots of modernity within Muslim civilisation. The second quite different use of the word favored by self-described contemporary Salafis, defines a Salafi as a Muslim who follows literal, traditional [...] injunctions of the sacred texts rather than the somewhat freewheeling interpretation of earlier Salafis. These Salafis look to Ibn Taymiyyah, not 19th-century figures of Muhammad Abduh, Jamal al-Din, Rashid Rida.³⁸²

It is this second understanding of the term “Salafi” which is used as our point of departure here. The literal meanings of the Qurʾānic passages and the Prophetic narrations hold a great authoritative value for Salafis, and

³⁸¹ Al Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol. 8:76: 437.

³⁸² W. Ende, “Salafiyya”, *Encyclopaedia of Islam, Second Edition*, vol. 8, p. 900b.

the *ṣaḥāba*, who are to be emulated, are role models for living as purely and piously as possible. By contrast, the tradition of jurisprudence (literally, everything produced or established by early, classical and medieval Muslim jurists) is devalued by Salafis; legal doctrines as developed by the *fuqahā'* are entirely rejected. The Salafis claim that the tradition of jurisprudence is not binding and has no authority. As the prominent Salafi advocate Mawdudi states: "everything contained in a book of *fiqh* does not constitute Islamic law."³⁸³ Accordingly, Islamic jurisprudence (*fiqh*) is swept aside as a fundamental reference, and instead the traditions of *ṣaḥāba* practice and opinion is effectively employed in its stead.

Salafi scholars make sweeping claims about the accuracy and comprehensiveness of the Qur'ānic teachings and the injunctions of the Sunnah tradition. According to them, no room is left for human legislation in an Islamic state. If anything, the Salafis argue that "human legislation, according to Islam, is and should be subject to the supremacy of divine law and within the limits prescribed by it."³⁸⁴ The Salafis deny man discretion in matters ordained in the Qur'ān or practiced by the Prophet. According to their ideology, this follows from Qur'ān 33:36: "It is not for any believing man or woman to decide by themselves a matter that has been decided by God and His messenger, and whoever commits an affront to God and His messenger is certainly on the wrong path."

³⁸³ Mawdudi, *The Islamic Law and Constitution*, p. 108.

³⁸⁴ *Ibid.*, p. 74.

Outstanding representatives of Salafi ideology are the Pakistani Mawdudi and the Saudi al-Hageel. For instance, Mawdudi states:

Islam admits no sovereignty except that God made, and consequently, does not recognise any law giver other than Him... the aspect of the legal sovereignty of God is as clearly emphasized by the Qurʾān as the one pertaining to His being the only deity to be worshipped... the Sunnah constitutes the only source of divine guidance and law, as no further revealed guidance is to come to which it may become necessary for mankind to turn... it is this dispensation by Muḥammad that constitutes the supreme law which represents the will of God, the real sovereign.³⁸⁵

Mawdudi held that the Prophetic teachings constitute the only source of Divine guidance and law. As for the Prophet, according to him, he was not merely the bearer of a message but also the divinely appointed leader, the ruler and the teacher. The duty laid on him, Mawdudi argued, was to explain and illustrate the law of God by his words and deeds. “This entire life-work of the Holy Prophet, which is the Sunnah which in conjunction with the Qurʾān formulates and completes the Supreme Law of the real Sovereign ... constitutes what is called ‘Shariʿah’ in Islamic terminology.”³⁸⁶

Suleiman al-Hageel’s *Human Rights in Islam and their Application in the Kingdom of Saudi* (2001) arguably represents the Saudi government’s understanding of the Qurʾānic teachings. Al-Hageel advocates that the Qurʾān

³⁸⁵ Ibid., pp. 72-3.

³⁸⁶ Ibid., p. 74.

has been and is the only constitution of the kingdom of Saudi Arabia, while the Prophetic Sunnah constitutes the approach to its application.³⁸⁷ Furthermore, the Qurʾānic teachings and the Prophetic practices are viewed as having laid down clear and categorical injunctions and prescribed specific rules of conduct. In this way, the Salafis reject any interference of any jurist or judge to alter the specific injunctions of the Sharīʿah or the rules of behaviour expounded by it.³⁸⁸ In further illustration of this theme, the Salafis' premises are as follows:

First, God perfected His religion, and secondly, the Qurʾān is the cornerstone and foundation of Islamic law. In addition, the Prophetic statements and the practice of his Companions (*ṣaḥāba*) concerning matters of worship and worldly matters are all infallible. Accordingly, Salafis suggest that the Companions' consensus is the only conceivable and credible consensus. According to the Salafis, it is possible to revive Islam and renew its genuine religious identity by following the Qurʾān, the sound Sunnah of the Prophet, and the guidance of the pious forefathers (*al-salaf al-ṣāliḥ*). Hallaq observes that Salafis (literalists) rejected jurisprudence because by “resorting to legal speculation and an over-use of reasoning” the *fuqahāʾ* “negate the essence of Islam, which is the reasonableness of religious obligation.”³⁸⁹

³⁸⁷ Sulaiman Al-Hageel, *Human Rights in Islam and their Application in the Kingdom of Saudi Arabia* (Riyadh: King Fahd National Library, 2001), p. 150.

³⁸⁸ Mawdudi, *The Islamic Law and Constitution*, p. 74.

³⁸⁹ Hallaq, *A History of Islamic Legal Theories*, p. 215.

Scholars of the Salafi approach are widely criticised for being too literalist in their reading of the Qurʾānic text and the Prophetic *ḥadīth*. Moreover, Salafis are accused of having reduced the areas of free and independent reasoning (*ijtihād*) established by early classical and medieval Muslim scholars. Ramadan criticises the Salafi approach, stating: “It is essential to question the methodological assumptions and some reductions made by contemporary literalist trends that often represent themselves as the only true ‘Salafi’. Those trends tend to reduce and level all areas of study and methodological categories established by scholars through the ages.”³⁹⁰ According to Ramadan, the Salafis are reductionists, and their restricted interpretation of the Qurʾān has made it impossible to give adequate answers to contemporary challenges.³⁹¹

4.2.2 The conservative approach (*muḥāfiẓūn/muqallidūn*)

The second group of scholars that is examined here is termed the camp of the conservatives (*muqallidūn*). These conservative scholars rely on the Qurʾān, the Prophetic tradition Sunnah, and the consensus (*ijmāʿ*) of the Companions, but contrary to the Salafis they also value the tradition of the earlier authorities of Muslim classical and late-medieval jurists. The conservatives’ have recourse to the Islamic jurisprudence tradition because the early jurists explored different areas of laws and were able to creatively engage with novel issues that occurred in their time. The works of the *fuqahāʾ*

³⁹⁰ Ramadan, *Radical Reform*, p. 17.

³⁹¹ Ibid., p. 17.

provide conservative Muslim thinkers with a variety of answers for novel cases, found neither in the Qurʾān nor in the Sunnah. Arguably, the conservatives' reliance is limited to following, by a process of imitation (*taqlīd*), the classical *ijtihād* of early Muslims jurists. Thus, they could be seen to lack the skills and, therefore, the ability to apply their own reasoning (*ijtihād*). Conservative thinkers usually adhere to one of schools of law and remain loyal to it.

Obviously, the majority of contemporary Muslim scholars are to some degree loyal to the *fiqh* tradition of the early generation of Muslim jurists. This tradition of the early generation is viewed as the safest path to comprehend the meanings of the Qurʾānic teachings and the Prophetic practices. For instance, the contemporary conservative Muhammad Oqla represents the conservative approach. In reference to *ḥadd* punishments, Oqla relies largely on the classical manuals of the early jurists to determine *ḥadd* offences, the various *ḥadd* punishments and the conditions of validity of *ḥadd* as well as the ways to inflict the *ḥadd* punishments. It appears that Oqla draws his arguments about *ḥadd* and the justifications for *ḥadd* punishments more or less directly from the Sunnī schools of law, without engaging in what could be termed *ijtihād*. Although Oqla makes extensive references to the Sunnī tradition, he fails to contribute critically to the contemporary disputes about *ḥadd* law and its justifications. All he does is to quote Muslim classical

jurists' opinions on the implementations of *ḥadd* punishment and the way it should be inflicted.³⁹²

Another conservative scholar, Muhammad Qadri, assumes that *ḥadd* punishments must be inflicted as a matter of fact. According to him, *ḥadd* punishments are very well established in the Islamic tradition (Qurʾān, Sunnah, *ijmāʿ* and *fiqh*). For Qadri, it is

[a] unanimous fact that the *ḥadd* is not established only through the Qurʾān but ... equally through Prophetic Sunnah and the definite *ijmāʿ* of his Companions.... [A]ny discrimination between Qurʾān and Sunnah for the establishment of the *ḥadd* is absolutely prohibited as an act of dastardly perversion contrary to the unanimous consensus of the Muslim *ummah* in all times and periods.³⁹³

For Qadri, jurisprudence is essential for a number of reasons. He is aware that the Qurʾān and the Sunnah contain very little about the actual implementations of *ḥadd* punishments. Qadri's and all other conservatives' reliance on the *fiqh* works is driven by necessity, especially when, as often in the law of *ḥadd*, the Qurʾān and Sunnah provide only broad and general principles. Further, the tradition of the Prophet cannot be trusted easily: it requires a careful examination of the transmitters of the *ḥadīth* as well as of the content of the *ḥadīth*.³⁹⁴

³⁹² Oqla, *Niẓām al-Islām*, pp. 209-10.

³⁹³ Qadri, *Islamic Penal Law System and Philosophy*, pp. 346-7.

³⁹⁴ *Ibid.*, p. 345.

There is no reason to believe that contemporary conservatives have attempted to critically evaluate the jurists' manuals. The *fiqh* tradition is relied on with no effort to critically read or systematize the arguments presented by classical jurists. This is clearly stated by Jamila Hussain, who holds that "the Qurʾān and Sunnah are the primary sources and the interpretations and opinions of the learned jurists the secondary sources."³⁹⁵ Indeed, the conservatives' approach is to view *fiqh* opinions as "sources", not as an ongoing discussion which they join in the spirit of critical dialogue.

4.2.3 The traditionalists' approach

The camp of contemporary Muslim thinkers that is referred to here as traditionalists shares many characteristics with the conservatives. The big difference is in the value the traditionalists attribute to *ijtihād*. Traditionalists claim that the pure form of Islamic law is embodied in the Qurʾān, the Sunnah of the Prophet and the consensus (*ijmāʿ*) of the early generation of Muslims. In difference to the conservatives, however, the traditionalists take the legal doctrines elaborated by Muslim classical jurists into considerable consideration. Traditionalists unanimously agree that there is a harmony between divine revelation (Qurʾān) and sound reason, and that these should not stand in conflict. Furthermore, if there appears to be a contradiction or conflict between the two, it is because one or the other has been

³⁹⁵ Hussain, *Islamic Law and Society*, p. 26.

misunderstood.³⁹⁶ The traditionalists emphasize that human reason is a fourth source of law which, according to them, is vital and necessary for evolving conditions.

Hallaq argues that the authority and prestige of the founding fathers and the later jurists (*fuqahāʾ*) is maintained and even defended by many traditionalist scholars.³⁹⁷ Further illustration of this claim is that there is good reason to believe that Muslim jurists of the traditionalist approach have realised that the Qurʾān and the Prophetic tradition of *ḥadīth* have often fallen short of supplying all the answers to contemporary problems, particularly in the area of civil transactions (they are believed to have provided a comprehensive system of worship and belief).

Accordingly, in the eyes of the traditionalists, there is a continuing need for *ijtihād* and *qiyās*, particularly when these sources do not contradict Islamic religious tenets. In addition, the public interest or welfare (*maṣlaḥa*) is one of the cornerstones of the traditionalists' approach. It is worth mentioning that the concept of *maṣlaḥa* has been amplified to such an extent that it can stand on its own as one of the main legal theories and philosophies in a modernised Islamic criminal law. A number of traditionalist scholars have contributed to the domain of Islamic law, and to the legal doctrines of *ḥadd*. Here I choose some of the most distinguished among them and present their methods and approaches in reference to Islamic criminal law.

³⁹⁶ Hallaq, *A History of Islamic Legal Theories*, p. 212.

³⁹⁷ *Ibid.*, p. 210.

Muḥammad Abū Zahra (b. 1898) is an example of a cautiously pro-*ijtihād* traditionalist scholar. He has written extensively about crimes (*jarā'im*) and punishments (*uqūbāt*) in classical jurisprudence (*fiqh*).³⁹⁸ Abū Zahra treats the Qurʾān as the primary source of legislation, hence, as the yardstick for all other Islamic sources of legal authority (Sunnah, *ijmāʿ*, and *qiyās/ijtihād*). He views the Sunnah of the Prophet as the secondary legislative source of law and holds it to fulfil an explanatory function. In reference to *ḥadd* offences, Abū Zahra regards *ḥadd* punishments as the precisely defined and ordained criminal law of the Qurʾān.³⁹⁹ He argues that the revealed passages (*naṣṣ*) dealing with *ḥadd* crimes indicate that *ḥadd* punishments have an upper limit – the unambiguous punishment dictated in the Qurʾān.⁴⁰⁰ Abū Zahra argues that the “*ḥudūd Allāh* are defined in the Qurʾān and for this reason when *ḥadd* crimes are brought before the judge the punishments are not subject to alteration or modification under any circumstances.”⁴⁰¹

When Abū Zahra has recourse to the tradition of jurisprudence it is because of the ambiguity of verses about the ways in which *ḥadd* punishments should be inflicted, ways that are found neither in the Qurʾān nor in the Prophetic narrations. According to Abū Zahra, “all the Islamic provisions came achieve the common good for peoples (*al-aḥkām al-sharʿiyya*

³⁹⁸ Abū Zahra, *Crime in the Islamic Jurisprudence*, p. 6.

³⁹⁹ *Ibid.*, p. 87.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*, p. 97.

kulluhā qad jāʿat li-maṣāliḥ al-ʿibād)”⁴⁰². *Ḥadd* offences, according to him, are crimes committed against the well-established interests of society; this, he holds, is clearly stipulated in the Qurʾān and the Sunnah. Abū Zahra highlights that the penalty for the crime protects *maṣlaḥa* and that implementing Islamic criminal law fulfils genuine justice in this world.⁴⁰³

Another prominent contemporary jurist is ʿAbd al-Qādir ʿŪda (d. 1954), author of *al-Tashrīʿ al-jināʿī al-Islāmī muqāraranan bi-l-qānūn al-waḍʿī* (“The Islamic criminal legislation in comparison with secular law”). Throughout his book, ʿŪda presents the opinions of the four Sunnī legal schools of *fiqh* and summarizes most of their disputes.⁴⁰⁴ For ʿŪda, the primary sources of Islamic law are the Qurʾān, Sunnah and consensus of the Companions. The secondary sources of law are the derivative sources of *ijtihād* and *qiyās*, which should agree with what is said in the Qurʾān and the Sunnah.⁴⁰⁵ As in the case of Abū Zahra, one sees here an acceptance of the *fiqh* tradition, combined with a cautious espousal of *ijtihād*.

The contemporary jurist and mufti al-Qaraḍāwī (b. 1926) represents the orthodox Muslim jurists who give the authority of classical jurists’ heritage a vital position in contemporary legal debate. His influential work *The Lawful and The Prohibited in Islam* (2003) is an attempt to explain the prohibitions of things, the purpose of the prohibition and its punishments. Al-

⁴⁰² Ibid., p. 27.

⁴⁰³ Ibid., p. 37.

⁴⁰⁴ ʿŪda, *al-Tashrīʿ al-jināʿī al-Islāmī muqāraranan bi-l-qānūn al-waḍʿī*, p. 5.

⁴⁰⁵ Ibid., p. 135.

Qaraḍāwī covers, for example, the punishments for fornication, theft and drinking alcohol. Al-Qaraḍāwī discusses the purposes of prohibitions from an Islamically philosophical point of view. He insists that the effect of threatening potential offenders with punishment has much greater impact than the punishment.⁴⁰⁶ Al-Qaraḍāwī focuses on the reasons and purposes behind the divine prohibitions and presents these as the crucial basis on which any theory of justification for the law of *ḥadd* must rest. Al-Qaraḍāwī pays little attention to the punishments of exceeding *ḥadd Allāh* and, instead, highlights the sinfulness of these prohibited acts in Islam.⁴⁰⁷

A more recent example of a contemporary jurist who qualifies as a “traditionalist” is Khaled Abou El Fadl, even though this appellation is open to debate, since Abou El Fadl is in many respects a lot more radical than the likes of Abū Zahra, ‘Abd al-Qādir ‘Uda and al-Qaraḍāwī. In *Rebellion and Violence in Islamic Law*, Abou El Fadl argues that “[c]onceptually, one should distinguish between juristic discourses, Islamic law, and Muslim law.”⁴⁰⁸ The first signifies how jurists have traditionally conceived of the law, the second is the ‘ideal’, inaccessible Law as it only exists in the mind of God, and the third refers to the reality of applied Shari‘ah in the history of Islam. El-Fadl’s main thrust in his approach is to demarcate the line between the divine ‘spirit’ of the Law on the one hand, and the way in which the jurists attempted to understand the purposes and functions of the divine law. He

⁴⁰⁶ Al-Qaraḍāwī, *The Lawful and the Prohibited in Islam*.

⁴⁰⁷ Ibid.

⁴⁰⁸ Abou El Fadl, *Rebellion and Violence*, p. 2.

writes that “the function of law and the role of jurists tend to emphasize the need for order and stability.”⁴⁰⁹

As to the Prophetic tradition, Abou El Fadl argues that the Muslim dogma does not assert that the *ḥadīth* literature is divinely protected from the possibility of corruption: “There is a considerable degree of creative subjectivity in the process of authenticating, documenting, organizing, and transmitting the reports attributed to the Prophet and the Companions.”⁴¹⁰ He views the Sunnah as “a symbolic construct that obtains its meaning and normative power from the juristic culture.”⁴¹¹

Despite the fact that Abou El Fadl values the tradition of jurists, he is very critical in pointing out some of their faults and shortcomings when dealing with the *fiqh* tradition. For example, he points out that sometime, “the jurisprudential inquiry did not focus on the original intent in order to service the text, but in order to service the socio-political reality through the use of the text.”⁴¹² He argues that respect for the integrity and independence of the Qurʾān and the absolute autonomy of its divine message does not mean that no interpretive community or individual may re-engage or re-examine the texts in which the divine will expresses itself.⁴¹³

4.2.4 The Modernist Approach

⁴⁰⁹ Ibid., p. 61.

⁴¹⁰ Abou El Fadl, *Speaking in God's Name*, p. 105.

⁴¹¹ Ibid., p. 97.

⁴¹² Ibid., p. 118.

⁴¹³ Ibid., p. 132.

The main feature of the modernists' approach is that the modernists devalue the tradition of jurisprudence (*fiqh*),⁴¹⁴ a feature the modernists have in common with the Salafi thinkers. Their main emphasis is concentrated on contemporary Qurʾān interpretations. To the Prophetic tradition of Sunnah, they have less recourse. Further, the consensus of the early Muslims (*ṣaḥāba*) is not binding for them as an authoritative source of law. Nonetheless, the modernists see in the early consensus "a worthy contribution to Shari'ah inasmuch as it has made possible changes to suit the needs of changing times and usages."⁴¹⁵

The majority of the modernist scholars altogether discarded the classical principles of legal theories, and the methodologies developed by classical jurists. Hallaq describes the modernists' approach thus:

[it] consists of understanding revelation as both text and context. The connection between the revealed text and modern society [turns] upon an interpretation of the *spirit* and *broad intention* behind the specific language of the texts.⁴¹⁶

The modernists consistently hold that the Qurʾān must be interpreted as a unified text and considered in light of the context of early Islam. They argue that all legal rules stipulated in the Qurʾān are in constant change. It is

⁴¹⁴ Hallaq observes that the modernists altogether discard the principles developed by the traditional jurists, and their hermeneutic, which he thinks is far from being well developed, is a new phenomenon in Islam. Cf. Hallaq, *A History of Islamic Legal Theories*, p. 214.

⁴¹⁵ Al-Maḥmaṣānī, *Falsafat al-tashrīʿ fī al-Islām*, p. 78.

⁴¹⁶ Hallaq, *A History of Islamic Legal Theory*, p. 231.

as if the modernists encourage and urge all Muslims to maintain the door for *ijtihād* widely open, but not to think about *ijtihād* within the narrow framework of the *fiqh* tradition. In failing to do this, modernists warn, application of the Qurʾānic rules will prove disastrous.⁴¹⁷

The modernists' approach entails three main steps. The first is to treat the Qurʾān as a unified scripture that has an underlying 'spirit' or general direction, as opposed to the atomizing approach of classical *fiqh*. Secondly, interpreters must consider the revelatory context of the Qurʾān. Thirdly, they must be aware of the fact that the Islamic legal norms are mutable and always evolving. One of the most prominent advocates of this approach is the Pakistani scholar Fazlur Rahman (d. 1988). In *Islam and Modernity: Transformation of an Intellectual Tradition* (1982), Rahman highlights that Muslim scholars traditionally failed to understand the underlying unity of the Qurʾān, coupled with their practical insistence upon fixating their attention on the words of various verses in isolation. He describes this approach as "atomistic", permitting laws to be derived from verses that were not at all legal in intent.⁴¹⁸ Furthermore, he enunciates that this piecemeal approach to the Qurʾān has not ceased in modern times; indeed, in some respects it has worsened.⁴¹⁹

Another prominent modernist thinker is the Lebanese jurist and philosopher Ṣubḥī al-Maḥmāsānī. In *The Philosophy of Jurisprudence in Islam*,

⁴¹⁷ Rahman, *Islam and Modernity*, p. 3.

⁴¹⁸ Ibid., pp. 2-3.

⁴¹⁹ Ibid., p. 4.

al-Maḥmaṣānī acknowledges that the principle of the evolution of Islamic law rests on the fact that conditions, customs and sects of the world and nations do not develop according to stable patterns or programs. There is an absolute need for constant change and from transiting one condition to another. “Inasmuch as this applies to persons, times, and provinces, it applies likewise to countries, ages and states. Such is God’s order amongst his creatures.”⁴²⁰

Al-Maḥmaṣānī’s main thrust revolves around the argument that the interests of the people (their *maṣāliḥ*) are the basis of the divine legislation of law. Thus, he argues, it is both necessary and reasonable that Shari‘ah rules should undergo changes to suit the changing times; and that these rules be affected by the social organisation and the environment. His model in this discussion is Ibn al-Qayyim al-Jawzīyah, who argued that the legal interpretation should change with the change in times, places, conditions, intentions and customs. Al-Maḥmaṣānī quotes Ibn al-Qayyim by stating that “ignorance of this fact [the necessity of change] has resulted in grievous injustices to the Shari‘ah, and has caused many difficulties, hardships, and sheer impossibilities, although it is known that the noble Shari‘ah, which serves the highest interests of mankind, would not sanction such results.”⁴²¹

Furthermore, textual ordinances and rulings, according to al-Maḥmaṣānī, may be set aside for three reasons. First, when the *ration legis* changes, that is when the ruling no longer produces the intended *maṣlaḥa*. Secondly, when the actual ruling is based on a custom that people no longer

⁴²⁰ Al-Maḥmaṣānī, *Falsafat al-tashrī‘*, p. 106.

⁴²¹ Ibid., p. 107.

practice. Thirdly, when necessity demands it.⁴²² This suggests that, in this way, contemporary jurists may address and challenge those laws of the Qurʾān and the Sunnah that are perceived to be incompatible with modern needs and attitudes, while the religious and ethical message of Islam as embodied in the sacred texts is left intact. Al-Maḥmaṣānī argues that disregarding textually based rulings does not mean that the text itself is altered, and therefore invalid, but only that its exegesis undergoes some change.⁴²³

4.3 *Ḥadd* Justifications in Muslims' Contemporary Debate

In order to shed more light on how contemporary Muslim thinkers have related their views of *ḥadd* to the classical *fiqh* tradition, this section explores how much recourse to classical justifications of *ḥadd* punishments can be detected in their writings. Generally speaking, contemporary authors tend toward the view that very little has been written in the classical *fiqh* tradition about the purposes behind *ḥadd* punishments. El-Awa argues that the jurists paid little attention to the justification of *ḥadd*. This is, as he puts it, due to the fact that

Muslim jurists were not interested in discussing the matter as these punishments are the province of God alone. Since they have been prescribed in specific terms and are to be imposed without question, it was

⁴²² Cf. Opwis, "Maṣlaḥa in Contemporary Islamic Legal Theory", p. 204.

⁴²³ Ibid.

considered unnecessary to say much about the purpose they served or the reasons for which they were prescribed.⁴²⁴

However, as the discussion in the previous chapters has demonstrated, classical jurists *did* reckon with a number of justificatory elements in *ḥadd* jurisprudence. In fact, classical jurists sometimes went to some length to justify the severity of *ḥadd* punishments, even if their accounts often lack a systematic categorization. In the following, I examine the extent to which each of the four contemporary camps has made recourse, whether explicitly or obliquely, to the classical discourse of Muslim jurists about the justifications of *ḥadd* punishments. This is all the more worthwhile the effort since *ḥadd* has come to be understood, both by Muslims and by Western observers, purely under the aspect of its being a divine decree (*muqaddar*) from God, when in reality the discourse about *ḥadd* as a preventative measure (*zajr, radʿ*) and expiatory act (*kaffāra*) continues to be quite rich, though not to equal measure in all of the four camps outlined above.

4.3.1 The Salafis/fundamentalists

4.3.1.2 *Ḥadd* as God's right (*ḥaqq Allāh*)

Salafis generally tend to embrace the idea that the *ḥadd* punishments are an immutable right of God, a similar view held by the majority of Sunnī jurists. They enunciate that *ḥadd* punishments as stipulated in the Qurʾān and

⁴²⁴ El-Awa, *Punishment in Islamic Law*, p. 25.

the Sunnah belong only to God; God's law must not be questioned or 'rationalized', because God lays no responsibility upon His creatures unless it is due to some divine wisdom of which He knows best.⁴²⁵ Thus, for them, once the crime is litigated to the judge the punishment must be inflicted regardless of any caveats discussed in the Sunnī tradition. Salafis have viewed *ḥadd* punishments as "the fulfillment of a right which belongs to Allāh; and since their enforcement is a duty towards Allāh, they may not be modified nor changed in any way, nor may they be abolished by either individuals or groups."⁴²⁶ Therefore, Salafis have described God's limits as prescribed in the Qurʾān and the Sunnah as "His sacred norms" (*maḥārimuh*) which He guards "jealously".⁴²⁷ Since there the tradition of Sunnī jurists is entirely discarded, there is no distinction made between the rights of God and those of the individuals.

Associating *ḥadd* laws directly with God, and stressing the notion that they are "God's rights" has led the Salafis in their literal reading of the Qurʾān to conclude that the limits prescribed in the Qurʾān are sacred and once and for all times fixed. To enhance their claim they ask why, if the *ḥadd* punishments were not God's rights, would the Prophet have been so very keen to include them in the Qurʾān, which states clearly that these punishments are inflicted because they are His rights (*ḥuqūquhu*). The fact that the Prophet and his Companions are reported to have implemented *ḥadd*

⁴²⁵ Ibid., p. 153.

⁴²⁶ Ibid., p. 158.

⁴²⁷ Ibid., p. 154.

punishments has also affected the Salafis understanding of *ḥadd* punishments as the rights of God which must be guarded.⁴²⁸

The Salafis' understanding of *ḥadd* punishments as representing and preserving God's rights is consistent with their literal approach to the Qurʾān and the Prophetic Sunnah. Salafis do not usually wish to enter debates about the wisdom or the rationale behind *ḥadd* punishments. According to them, there is no need to justify God's injunctions, as He knows what is best for His creatures. To justify the *ḥadd* punishment requires investigating the underlying meaning of the Qurʾān, its 'spirit', and such an endeavour is clearly rejected by the Salafis, as the only authoritative source for them is the plain meaning of Qurʾān. The Qurʾān defines the crime and its punishment, and examples of the implementation of the *ḥadd* punishment are found in the Prophetic tradition. This suffices for the Salafis, and they urge the Muslim ruler or government to apply God's law. Since the Salafis totally discard the jurisprudence tradition, the term *ḥaqq Allāh* is perceived differently than in the *fiqh* tradition, where it is tied to the notion of the "common good" (*maṣlaḥa*), especially by the Ḥanafis and the Mālikīs (see ch. 1). The only point in common with the *fiqh* tradition is that *ḥadd* law is a divine ordinance, but for the Salafis it is a non-negotiable law.

4.3.1.3 *Ḥadd* as prevention (*zajr*, *radʿ*)

⁴²⁸ Mawdudi, *The Islamic Law and Constitution*, p. 72; al-Hageel, *Human Rights in Islam and their Applications in the Kingdom of Saudi Arabia*, 153.

Although, as stated, Salafi scholars are generally averse to exploring the purpose or underlying ‘meaning’ of the *ḥadd* punishments, one notices that they often comment rather extensively on the “infinite” wisdom behind the implementations of *ḥadd* punishments. Their general assumption is that “human beings are naturally predisposed to avoid pain and discomfort, hence, if they know that committing a crime will result in the enforcement of such penalties, this will serve to deter them from engaging in such acts of disobedience.”⁴²⁹ Therefore, *ḥadd* punishments are viewed and presented as “a protective wall, as it were; it is tantamount to the public statement that Muslim society rejects crime and will not allow it under any circumstances.”⁴³⁰ Importantly, Salafis have regarded the severe punishments in Islamic law as a Muslim duty to guard and preserve the five most essential elements of Islam (*al-ḍarūriyyāt al-khamsa*), clearly these were the elements elaborated by the early jurists of the Mālikī school of law. For instance, Al-Hageel justifies *ḥadd* punishments by suggesting that they

prevent bloodshed; they prevent life from being wasted; they protect people’s honour from being violated and their lines of descent from becoming confused; they keep money from being lost, wasted or consumed in an unjust way; they preserve people’s minds from imbalance and even death; and they prevent religion from becoming an object of ridicule.⁴³¹

⁴²⁹ Al-Hageel, *Human Rights in Islam*, p. 153.

⁴³⁰ Ibid., p. 149.

⁴³¹ Ibid., p. 153.

Salafis describe the punishments for offences like adultery and false accusation as punishments for social crimes and acts of public indecency. Thus, for the Salafis, it is necessary for such crimes to be retaliated by severe punishments which can serve as an effective restraint and deterrent. The punishment for false accusation is declared to “prevent people’s morals and honour from being attached by lying tongues and false report, and to prevent people from raising accusations against one another unless they have evidence in support of their claims [...] the punishment for such accusations in Islamic law has been established to prevent the fulfillment of this very aim.”⁴³²

Similar arguments occur in reference to theft. The Salafis propose that the purpose of severe punishments is the benefit of society. Therefore, amputation of the hand is to sacrifice a part for the sake of the whole community, which is regarded as one of the main principles of the *ḥadd* law. Amputation of the thief’s hand serves as a lesson and warning to those who entertain thoughts of taking other people’s money so that, instead of doing what they may have had in mind, they will refrain, thereby preserving and protecting other people’s property.⁴³³ Finally, the punishment for *ḥirāba* is declared to be a

deterrent whereby those criminals may think twice before they consider committing such crimes. The psychological dimension of this

⁴³² Ibid., p. 163.

⁴³³ Ibid., p. 165.

penalty is based in the idea of balance, that is, while a person is contemplating a crime, he will be reminded of the penalty which will, in return, make him consider the dreadful consequences of committing. This Islamically prescribed penalty works as a deterrent due to its psychological-oriented basis.⁴³⁴

The Salafis pay far less attention to *ḥadd* punishment as an individual deterrent. Their sole concern is about enforcing the *ḥadd* punishments as set forth in the Qurʾān and the Sunnah as the only sufficient remedy to do away with sinful crimes or, at the very least, to minimize them.⁴³⁵ Overall, the Salafis display a curious tendency to engage in judgments about the deterring effect of *ḥadd* punishments, even if such reasoning is a commonplace of the *fiqh* tradition, which in theory the Salafis refuse to acknowledge. Further research may bring to light, however, variations within the Salafi camp. Here I am outlining only some of their basic arguments.

4.3.1.4 *Ḥadd* as expiation (*kaffāra*)

The Salafis concur with the Prophetic tradition that “God is too gracious to punish one of his servants twice for the same offence.”⁴³⁶ There has been reliance on and recourse to the classical justification about considering *ḥadd* punishments as instruments of correction for those who exceed the limits of God. In fact, the punishments are presented to Muslims as “instruments of corrections” (*jawābir*) in the sense that, if someone

⁴³⁴ Ibid., p. 177.

⁴³⁵ Ibid., p. 155.

⁴³⁶ Ibid., p. 153.

commits a crime for which one of these penalties has been prescribed, and if the penalty is then carried out against the culprit, this serves to atone for his crime.”⁴³⁷

Salafis rely on the Prophetic *ḥadīth* according to which he said that *ḥadd* punishments are acts that expiate one from the hereafter’s punishment.⁴³⁸ They completely neglect the disputes of classical jurists about whether to suffer *ḥadd* is an expiatory act. There is a complete absence of legal argumentation about expiation, repentance and their implications for the hereafter. This is due to the fact that the Salafis restrict themselves to the Qurʾān, Sunnah and the tradition of the Prophet’s Companions (*salaf*). Their rejection of the *fiqh* tradition has affected their ability to critically discuss and therefore to justify *ḥadd* punishments as expiatory acts.

4.3.2 Conservatives’ justifications

4.3.2.1 *Ḥadd* as God’s Rights (*ḥaqq Allāh*)

Conservatives tend to argue that *ḥadd* offences are divinely defined, hence, *ḥadd* punishments ought to be considered likewise “ordained” (*‘uqūbāt muqaddara*). For this reason, *ḥadd* punishments are considered rights of God. Oqla argues that *ḥadd* punishments are fixed and cannot be waived once the crime is brought before the judicial authority. In fact, no one has the right to

⁴³⁷ Ibid.

⁴³⁸ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol. vi, p. 7; Muslim, *Ṣaḥīḥ Muslim*, vol. 2, p. 742; al-Tirmidhī, *Sunan al-Tirmidhī* (Germany: Thesaurus Islamic Foundation, 2000), vol. 1, p. 390.

waive *ḥadd* under any condition.⁴³⁹ Thus, in *ḥadd* punishment any intercession (*shafā'a*) is unacceptable either by the judge or by the ruler.⁴⁴⁰ Further illustration of this claim is that only God knows the wisdom (*ḥikma*) behind the *ḥadd* punishments; this wisdom can be understood as to protect and maintain the welfare of Muslims. Although conservatives value the *fiqh* tradition they completely reject *ijtihād* and *qiyās* because they view *ḥadd* punishments as simply “ordained” (*muqaddar*).⁴⁴¹

4.3.2.2 *Ḥadd* as prevention

Conservatives argue that the aim of *ḥadd* punishments is to generally and individually prevent crimes. This rests on the Qurʾānic verses that describe *ḥadd* punishments as a disgrace. This has led the conservatives to justify *ḥadd* punishments for the reason that they deter those who have even the slightest inclination towards committing *ḥadd* crimes; such people would restrain themselves in view of the punishment. As Qadri argues, “in order to achieve this objective, Shariʿah has clearly commanded that the fixed punishments of Islam should not be reduced or mitigated even under pressure of the sentiment of mercy.”⁴⁴² He claims that the ultimate purpose of the severe punishments of *ḥadd* is to put fear of prosecution into the hearts of the

⁴³⁹ Oqla, *Nizām al-Islām*, p. 155.

⁴⁴⁰ However, while *ḥadd* is the right of God, talionic punishment (*qiṣās*) is the right of Muslims. Ibid., p. 202.

⁴⁴¹ Ibid., p.207.

⁴⁴² Qadri, *Islamic Penal System and Philosophy*, p. 493.

public, for example, by hanging up the chopped-off hands and feet of the criminal, and by the punishment of stoning in broad daylight.⁴⁴³

Moreover, *ḥadd* punishments are retributive in nature. As conservatives have advocated, “the first objective of Islamic punishment is to award punishment to the culprit equal to the magnitude of his guilt because this is inflicted in exchange for the crime he has committed.”⁴⁴⁴ It is believed that the idea of retribution is rooted in the Islamic philosophy of punishment on the assumption that the suffering originating from a sinful or criminal act cannot be adjusted without punishment.⁴⁴⁵ The punitive character of Islamic penal law is represented through the infliction of some of the punitive practices. As Qadri argues concerning death penalties, amputation of hands or feet, imprisonments, transportation, confinement: “The criminals are prevented from repeating the crime either due to a permanent or temporary disability.”⁴⁴⁶

4.3.2.3 *Ḥadd* as expiation (*kaffāra*)

Conservatives share with the Salafis the view that *ḥadd* punishments are acts of an expiatory nature, and a means of moral and spiritual purification of the crime committed. Qadri comments in regard to the philosophy of Islamic penal law that

⁴⁴³ Ibid., p. 494.

⁴⁴⁴ Ibid., p. 490.

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid., p. 491.

if Islam had not prescribed these kinds of punishments, its penal system would have remained incomplete and primitive. It is a remarkable feature of the Islamic penal system that it has created a balance between the mundane and spiritual aspects of human life by prescribing physical punishments to eliminate ethereal accountability.⁴⁴⁷

Conservatives have argued that the justification of *ḥadd* as an expiation is clearly evident in a number of prophetic narrations, for example, in the stories of Mā'iz and al-Ghāmidiyya which present the Prophet as voicing the opinion that Mā'iz and al-Ghāmidiyya were forgiven because they willingly requested the Prophet to carry out the punishments for the sins they committed. Oqla argues that if Mā'iz and al-Ghāmidiyya were not sure they would be forgiven, they would not have insisted on the punishments being carried out. They desperately wanted to be expiated from the punishments in the hereafter.⁴⁴⁸ Conservatives rely the Prophetic *ḥadīths* to indicate that *ḥadd* punishments expiate the culprits for sins committed in this world. Conservatives expand their arguments about *ḥadd* punishments to include repentance and its effect on the process of carrying out the punishments. They acknowledge the disputes of Muslim jurists on repentance.

⁴⁴⁷ Ibid., p. 504.

⁴⁴⁸ Oqla, *Niẓām al-Islām*, p. 107.

4.3.3 The traditionalists' justifications

4.3.3.1 *Ḥadd* as God's Right (*ḥaqq Allāh*)

Traditionalists tend to view *ḥadd* punishments as the “pure” right of God (*ḥaqq khālīṣ*). This is because *ḥadd* are defined in the Qurʾān and, therefore, are strictly fixed. Al-Qaraḍāwī states that “Islam has restricted the authority to legislate the *ḥarām* and the *ḥalāl*, taking it out of the hands of human beings, regardless of their religious or worldly position, and reserving it for the Lord of human beings alone.”⁴⁴⁹ This is a similar approach to the classical view on the nature of *ḥadd* law: “punishment prescribed by God is the exercise of His exclusive Right. *Ḥadd* is the fixed punishment for the reason that this can neither be increased nor be decreased by anybody.”⁴⁵⁰ Therefore, *ḥadd* punishments are perceived as the “sacred norms set by Him” (*maḥārimuh*); they must be guarded and not exceeded.⁴⁵¹ Traditionalists have agreed with the classical jurists that exceeding these limits constitutes an aggression against God, even if the aggression is made against a private right.⁴⁵²

According to Abū Zahra, *ḥadd* punishments are God's rights because it is not left to the Muslim judges and rulers to decide which punishment

⁴⁴⁹ Al-Qaraḍāwī, *The Lawful and the Prohibited in Islam*, p. 7.

⁴⁵⁰ Mohammed Waqar, *Islamic Criminal Laws: Hudood Laws and Rules, with up to Date Commentary* (Lahore: Nadeem Law Book House, 1994), p. 68.

⁴⁵¹ Abū Zahra, *Crime in the Islamic Jurisprudence*, p. 43.

⁴⁵² Ibid., p. 73: *inna al-ḥadd mahmā yakun lil-ʿabd min ḥaqq shakhṣi fihā, fa-fī jarāʾimihā iʿtidāʾ ʿalā ḥaqq Allāh.*

combats which crime. God's right is presumed to be "embodied in the general *ḥaqq* of the Muslim society. For this reason God has ordained *ḥadd* punishments to protect Islamic society... *ḥadd* punishments are set to protect Muslims."⁴⁵³ In a further illustration of this claim, *ḥadd* norms establish what is a good deed (*faḍīla*) and an obscene deed (*radhīla*), and they establish a firm separation between them.⁴⁵⁴ Things forbidden in the Qurʾān are warned against and, if the forbidden acts are committed, this is seen as an aggression against God and society.⁴⁵⁵

The traditionalists point out that Shariʿah has aims and purposes embodied in God's law. God's law aims to preserve and protect the general welfare of humanity. Thus, *ḥadd* punishment is perceived as God's right because it guarantees the benefit of the whole community.⁴⁵⁶ Abū Zahra states that "the precise explanation of what constitutes a right of God is that God's right is embodied in the public interest (*ḥaqq Allāh mā yamassu l-mujtamaʿ*)".⁴⁵⁷ By equating "God's right" with the well-being of society, the traditionalists show themselves to be more willing than the conservatives to engage with the more speculative side of *fiqh*.

4.3.3.2 *Ḥadd* as preventions

⁴⁵³ Ibid., p. 87.

⁴⁵⁴ Ibid., p.97.

⁴⁵⁵ Ibid., p. 49: *ḥimāyat al-faḍāʾil wa-l-amn ḥaqq li-Allāh wa-āna man yaʿtadi ʿalā hādhi al-faḍāʾil fa-ka-annamā yaʿtadi ʿalā Allāh*.

⁴⁵⁶ ʿUda, *Al-Tashrīʿ Al-Jināʿi Al-Islāmī*, p. 513.

⁴⁵⁷ Abū Zahra, *Crime in the Islamic Jurisprudence*, p. 43.

Traditionalists justify the severity of the *ḥadd* punishment as a deterrent tool to effectively combat crimes at all levels, generally and individually. The examples given by them are based on the Saudi government statistics. These statistics, according to Jamila Hussein, reveal that “the existence of Islamic criminal law ... has resulted in it [Saudi-Arabia] being remarkably free of crime. The deterrent effect of harsh penalties such as cutting of the hand for theft has reduced the incidence of theft to a very low level.”⁴⁵⁸

Thus, the *ḥadd* punishment in their debates is said “to fit the crime, taking into account the circumstances of the accused”; the traditionalists thus hope “that whatever punishment is given will deter further immorality and corruption.”⁴⁵⁹

It appears that the majority of the traditionalists tend to justify the *ḥadd* punishment as a measure aiming at general deterrence. For instance, Abū Zahra justifies *ḥadd* punishments as preventing people from committing the same offence, and this is in fact the *ḥadd* punishments’ primary aim (*al-maqṣad al-a‘ẓam*). *Ḥadd* punishment serves as a lesson for the public to resist future temptation to commit forbidden crimes.⁴⁶⁰ Punishments like stoning, amputation, and crucifixion are meant to deter Muslims from committing such offences. Also Ḥadād al-Ṭāhir views *ḥadd* punishments as punishments

⁴⁵⁸ Hussain, *Islamic Law and Society*, p. 140.

⁴⁵⁹ Ḥadād Al-Ṭāhir, *Muslim Women in Law and Society* (London: Routledge, 2007), p. 54.

⁴⁶⁰ Abū Zahra, *Crime in the Islamic Jurisprudence*, p. 260.

ordained to deter further immorality and corruption.⁴⁶¹ The primary aim of punishments like scourging is to deter the culprit; for instance, in the offence of false accusation the punishment is believed to “deter the culprit (*ta’dīb al-jānī*).⁴⁶² Muhammad Waqar views the punishment of *ḥadd* to act as a deterrent, as well as a reformatory measure for the offender.⁴⁶³

4.3.3.3 *Ḥadd* as expiation (*kaffāra*)

Contemporary traditionalists seem to pay relatively little attention to the justification of *ḥadd* punishment as expiation. Since the Qurʾān is completely silent on *ḥadd* punishment as a form of expiatory act, traditionalists have tended to avoid the question whether *ḥadd* punishment atone for the culprit’s offence in the hereafter. Traditionalists are more inclined to discuss repentance and its role in attaining forgiveness in the hereafter. They make extensive recourse to the Ḥanafī classical tradition of *fiqh* to stress that repentance atones for the sin whether the punishments is inflicted or not.

For instance, Abū Zahra seems to advocate the opinions of the Ḥanafis when he argues that “whosever repents will be forgiven”,⁴⁶⁴ and that “repentance waives and expiates *ḥadd* punishment in this world and the

⁴⁶¹ Al-Ṭāhir, *Muslim Women in Law and Society*, p. 54.

⁴⁶² ‘Ūda, *Al-Tashrī‘ Al-Jinā‘ī Al-Islāmī Muqāranan bi l-Qānūn Al-Waḍ‘ī*, p. 523.

⁴⁶³ Waqar, *Islamic Criminal Laws*, p. 25.

⁴⁶⁴ Abū Zahra, *Crime in the Islamic*, p. 283.

next.”⁴⁶⁵ Abū Zahra quotes the Prophetic *ḥadīth* according to which the Prophet associated forgiveness only with repentance. Arguably, Abū Zahra contradicts himself; in his introduction to *ḥadd* laws, he defines *ḥadd* punishments as an immutable fixed law of divine measures. In the section on repentance, Abū Zahra shares the view of the Ḥanafīs that repentance waives and expiates the *ḥadd* punishment. He argues that “repentance purifies the soul and *ḥadd* punishments are ordained to purify it, and if repentance does purify it, then there is no need for the punishment.”⁴⁶⁶

4.3.4 The modernists’ justifications

4.3.4.1 *Ḥadd* as the right’s of God (*ḥaqq Allāh*)

Modernists agree that *ḥadd* as mentioned in the Qurʾān constitute a “divinely ordained law”. However, they interpret the nature of *ḥadd* punishments as God’s rights differently, and provide a different interpretation to the classical one. *Ḥadd* norms are viewed as divine instructions stipulated in the Qurʾān to give general guidance to humans on moral and religious duties.⁴⁶⁷ The modernists deny that the Qurʾān encompasses Sharīʿah in the form of a codified law that is eternally unchangeable. Instead, as Shahrour holds, God merely sets certain limits for the law, limits *within* which there is scope for human legislation. Human societies are emphatically encouraged to

⁴⁶⁵ Ibid., pp. 285-286.

⁴⁶⁶ Ibid., p. 284.

⁴⁶⁷ Cf. Shahrour, *The Qurʾān, Morality and Critical Reason*, p. 115.

explore this scope freely.⁴⁶⁸ Contrary to the classical understanding of *ḥadd* norms as “fixed”, the modernists have argue that the relationship between the eternal validity of the legal message and the historical temporality is dynamic. They view the spirit of the Islamic legislation as seeking to avoid implementation of the *ḥadd* punishments, especially when they are indiscriminately enforced. Instead, modernists consider mitigation as absolutely vital.

The fact that *ḥadd* are stipulated in the Qurʾān does not indicate that *ḥadd* punishments are fixed and immutable. As Kamali suggests, “*ḥadd* punishments are meant to prevent crime and signify the limits of what is tolerable and what is not... The concept of “separating or preventing limits” of the Qurʾān is thereby replaced by the idea of fixed punishment.”⁴⁶⁹ Kamali thus accuses the *fiqh* tradition of reducing the Qurʾān’s broad and comprehensive concepts of *ḥadd* to fixed mandatory punishments.

4.3.4.2 *Ḥadd* as prevention

Modernists argue that *ḥadd* punishments must be understood, in the words of El-Awa, on the basis of “a justification for punishment which looks to the future, i.e., to the prevention of crime”, so that “what is taken to be of supreme importance is that punishment prevents offences.”⁴⁷⁰ They advocate that the recognition of the deterrence aspect embodied in the application of

⁴⁶⁸ Shahrour, *The Qurʾān, Morality and Critical Reason*, p. 179.

⁴⁶⁹ Kamali, “Punishment in Islamic Law”, p. 219.

⁴⁷⁰ El-Awa, *Punishment in Islamic Law*, p.29.

the Islamic penal system is “deeper and stronger than in other systems... deterrence is recognised as the predominant justification for punishments, particularly for *ḥadd* punishments.”⁴⁷¹ Modernists have held that the current implementations of *ḥadd* punishments show little care for offenders.⁴⁷²

The modernists agree that the general aim of *ḥadd* punishments is to stop a crime from being repeated in the future. The more severe the punishment is, the graver the crime. This rests on the Qurʾānic *ḥirāba* verse in which the noun *nakāl* can be variously translated as ‘exemplary punishment’ or ‘punishment as a deterrent’. In Shahrour’s view, “Allāh has set a condition by which the thief’s hand shall be cut off: its aim should be a warning so that the crime will not be repeated. This means that the punishment has a sociopedagogic function; it is not a merciless revenge of a crime.”⁴⁷³

4.3.4.3 *Ḥadd* as expiation (*kaffāra*)

It is obvious that Muslim modernist scholars do not pay attention to the juristic dispute about *ḥadd* punishments as acts of an expiatory nature. This is due to the fact that modernist scholars have faced difficulties in meeting the challenges facing the Islamic Shariʿah as a whole, and its Islamic criminal law in particular. Modernists have been interested in finding solutions to solve these challenges, in fact the modernist camp has been the only one to recognise and effectively deal with the contemporary difficulties

⁴⁷¹ Ibid.

⁴⁷² Ibid.

⁴⁷³ Shahrour, *The Qurʾān, Morality and Critical Reason*, p. 197.

faced by the Islamic Shari'ah, particularly the application of *ḥadd* laws. Arguably, the demands for reforming the Islamic Shari'ah and making it suitable for contemporary needs has led most modernists to take steps to re-examine the classical heritage of the Islamic sources, and in most cases, to reject it. There is no single argument in the modernists' debate about considering *ḥadd* punishment as a punishment that expiates the culprit from the hereafter's punishment.

What characterizes the modernists' debate about the justifications of *ḥadd* is their outright rejection of regarding the *ḥadd* as immutable law and of the idea that only God knows its purpose. The modernists clearly believe that some of *ḥadd* justificatory aspects are not acceptable in debates about the applicability of *ḥadd* to our modern time. This includes the aspects of considering *ḥadd* as the right of God and as expiation. Modernist scholars often consider the implementation of *ḥadd* punishments as unjust acts perpetrated in the name of Islam and on the basis of sheer ignorance by literalist Muslims and the régimes that stand behind them.

4.4 Conclusion

In conclusion, this chapter has demonstrated that contemporary Muslim scholars approach the Islamic tradition differently. Throughout their debate on *ḥadd* punishments and how they can or cannot be justified, it is evident that the debate has always been contentious, and will remain so. I have illustrated that the basis for this scholarly contention is the different approach to the sources of Islamic law, particularly the Islamic criminal law of *ḥadd* as it was developed in the *fiqh* tradition. Consequently, the debate is concerned with either defending the Islamic tradition or calling for a more or less radical reform.

When speaking about *ḥadd* punishments in contemporary Muslim discourse, one cannot escape dealing with the different approaches applied to the most authoritative sources of Islam. I have examined to what extent the contemporary justifications of *ḥadd* punishments correspond to the classical justifications of *ḥadd punishments*. Strikingly, in discussing the general views on the theory of *ḥadd* punishments, one notices that the contemporary discourse on *ḥadd* has completely shifted from the general discourse on *ḥadd* as in *fiqh* criminal law to a discourse on whether the Islamic authoritative sources, that is, Sunnah, *ijmāʿ* and *ijtihād/qiyās* (the Qurʾān never being questioned for obvious reasons), are in themselves valid or not. A derivative question is: if these sources are (still) valid, to what extent are these sources relevant in a modern-day context?

I noticed throughout conducting this chapter that little attention has been given to the classical details about *ḥadd* offences and the punishments associated with them. This may in fact be another repercussion of the kind of fundamental questioning that underlies all contemporary Muslim discourse on Shari‘ah: This questioning creates insecurity, and insecurity polarizes, so that either scholars take the *fiqh* tradition for granted, without really engaging with it, or they reject it outright.

In part I of this dissertation, I attempted to survey the classical justifications of *ḥadd* punishments critically and systematically. This has enabled me to argue that justificatory theories of *ḥadd* punishments are far less discussed in contemporary Muslim discourse than they were in the classical tradition. I have suggested that Salafis and conservatives justify *ḥadd* punishment from a confessional stance, and that there is no real legal argumentation going on concerning, in particular, the severity of *ḥadd* punishments. The Salafis and the conservatives tend to stress, instead, that *ḥadd* offences and their prescribed punishments are fixed and immutable. Thus, the punishments are not subject to any modifications.

With regard to the methods and approaches applied to the Islamic tradition, traditionalists and conservatives have applied similar methods to validate the Qurʾānic stipulations of *ḥadd* punishments, the Prophetic practices and the legal debate of Muslim jurists. Modernists and Salafis, on the other hand, reject the tradition of jurisprudence. Periodically, they enunciate the need for recourse only to the Qurʾānic teachings. However, their approach to the Qurʾān differs significantly. Salafis are

literalists, because they assume the Qurʾān to be the true word of God revealed to His Prophet, accurate and fully applicable in his time and in ours. Thus, the Salafis assume the originality and purity of the Qurʾānic teachings. In addition, they acknowledge the practice of the Prophet and His pious Companions and regard them as the authoritative secondary source of law of explanatory nature. Modernists, on the other hand, pay more attention to what they perceive as the underlying spirit of the Qurʾān. They deny a one-to-one translation of Qurʾānic particulars to contemporary life; they also by and large reject the Prophet Sunnah.

As for the traditionalists, the debate about the justification of the severity of *ḥadd* punishments does not exceed what one finds in the classical treaties of Islamic jurisprudence (*fiqh*). Traditionalists advocate that *ḥadd* punishments are immutable; however, the traditionalists make full recourse the many ways offered by the *fiqh* tradition to circumvent the implementation of the punishments (in particular, by way of *shubha*).

I have argued that the only camp to have shown hardly any interest in justifying the *ḥadd* punishments is the modernists' camp; this may be because they completely devalue the *fiqh* tradition, and most of the *ḥadd* justifications stem from *fiqh*. As I demonstrated in this chapter, the modernists are concerned with reconstructing the Islamic tradition in a fundamentally new direction. The process of reformation is still taking place in the circles of Islamic modernists intellectuals. The modernists insist on the fact that it is necessary to emphasise the core principles of Islam; for them, Shariʿah law constantly changes and evolves. The modernists hold consistently that

Shari'ah is compatible with civilisation in every time and place. Al al-Maḥmaṣānī writes, "the spirit of the Shari'ah, therefore, was and still is founded upon public interest, public good and the facilitation of life in general."⁴⁷⁴ The modernists make ample recourse to the concept of *maqāṣid*, holding that there is a crucial need for re-applying this concept to the Qur'ān, to shift one's hermeneutical emphasis from the letter of the text to its purposes and to the ethical direction behind it. As Johnston observes:

The *maqāṣid* perspective is ... a choice to shift one's hermeneutical emphasis from the letter of the text to its purpose and thus, to the ethical direction behind it. It implies a primary ontological and epistemological shift – a step away from the classical Sunnī-Ash'arī tendency toward ethical voluntarism, and a step toward granting human reason more latitude in interpreting and applying the "general edicts" of the texts.⁴⁷⁵

Finally, all four camps justify *ḥadd* punishments as a way of leading to general and individual deterrence. Salafis and conservatives claimed that *ḥadd* punishments maintain peace and justice in the countries in which Islamic criminal law is implemented. The modernists argue that *ḥadd* law can in theory achieve general and individual prevention; however, the current implementation of *ḥadd* punishments has caused severe injustices against women and poor people, for instance, in countries like Sudan and Nigeria.

Salafis and modernists share the same goal, namely, the reformulation of legal theory in a manner that will bring into successful synthesis the basic

⁴⁷⁴ Maḥmaṣānī, *The Philosophy of the Islamic Legislation*, p.119

⁴⁷⁵ Johnston, "Maqāṣid Al-Shari'ah", p. 186

religious values of Islam, on the one hand, and a substantive law that is suitable to the needs of a modern and changing society, on the other. The methods they use to arrive at this end, however, differ significantly.⁴⁷⁶ Salafis and modernists have criticised traditionalist scholars for having all too freely practiced *qiyās*, which led them to derive rulings contrary to the intention of the Lawgiver.⁴⁷⁷ Scholars like Kamali, El-Awa and Quraishi argue that the primary source of law which is the Qurʾān contains very little about the theory or the philosophy behind the punishments of *ḥadd* crimes. They argue that the Qurʾān contains basic rules and commands, usually expressed in a very broad manner and frequently capable of varying interpretations.⁴⁷⁸

⁴⁷⁶ Hallaq, *A History of Islamic Legal Theory*, p. 214.

⁴⁷⁷ Ibid, p. 217.

⁴⁷⁸ El-Awa, *Punishment in Islamic Law*, p. xi.

Chapter 5: The contemporary application of *ḥadd* punishments and the disputes surrounding it

5.1 Introduction

In chapter 4, I examined a number of intellectual trends within contemporary Muslim legal thought and attempted to show how representatives of each of these trends position themselves vis-à-vis traditional legal doctrines regarding *ḥadd* punishments. While the question as to how contemporary thinkers relate to traditional Islamic jurisprudence is of great importance, in this chapter I will discuss how new emphases and foci in the debate, largely but not always independent from the questions asked by *fiqh*, have emerged in the contemporary debate about *ḥadd* law and its current application.

This chapter tackles issues concerning contemporary applications of *ḥadd* punishments. It encompasses a review of contemporary Muslims' calls for the re-introduction of *ḥadd* laws and the capital and corporal punishments associated with them, as well as the so-called "Islamisation of the criminal code" proposed in a number of Islamic countries. Instances of the implementation of Islamic criminal law in countries of the Muslim world

have encountered a tremendous reaction from the West, human rights organisations and victims of *ḥadd* laws.⁴⁷⁹

The chapter, first, provides historical background on a number of Islamic countries where *ḥadd* laws are implemented and have been constantly reported to human rights organisations. I discuss the application of Islamic criminal law in Islamic countries that have either been implementing the law or have recently re-introduced it in place of Western criminal law. Secondly, this chapter attempts to critically evaluate four key arguments, both in favour and against the (re-)introduction of *ḥadd* laws in Muslim societies, that have emerged in the contemporary debate of Muslims scholars concerning *ḥadd* theory as well as the punitive practices involved in it. In this endeavor, the distinction between four basic camps that I have proposed in ch. 4 is crucial in order to understand on what theological and hermeneutical grounds Muslims scholars argue when they debate the potentiality of activating the

⁴⁷⁹ As Heiner Bielefeldt notes, “[i]t seems beyond question that many tensions between traditional Islamic norms and international human rights standards exist. No one can predict whether and how they will be settled in the future. However, because all cultures and religions are open to various interpretations and evolution, the frequently perceived antagonism between universal human rights and cultural identity appears at least questionable.” See Bielefeldt, “Muslim Voices in the Human Rights Debate”, *Human Rights Quarterly* 17,4 (1995), pp. 595, cf. 601. Johnston reflects on the Muslims’ reaction to the perception of the concept of human rights in the following words: “the human rights concept has had a strong and pervasive impact on Muslim writers from the 1970s on. From official Muslim declarations to a number of individual articles and books, the literature is impressive. In the name of Islam this concept is wholeheartedly endorsed for the most part, but for a minority of other writers, it is condemned as a Western, secular intrusion.” Johnston however criticises these writings as to neither draw coherently from traditional Muslim sources nor squarely face the obvious discrepancies between the two systems. See Johnston, “Maqāṣid Al-Sharī‘ah”, p. 152.

Islamic Shari‘ah, in particular its criminal portion. Thirdly, I attempt to provide a platform to understand why and how contemporary Muslim scholars tend to disagree over the theory of Islamic criminal law and its current implementation. This, it is hoped, will allow us to comprehend the reasons behind the emerging calls that either advocate *ḥadd* laws or wish nullify them. Overall, I hope to shed light on one of the most controversial issues in contemporary Islamic law, namely *ḥadd*, an area in which one sees very clearly a great diversity of Muslim positions.

5.2 Islamic *ḥadd* laws today

During the pre-modern period, Islamic *ḥadd* laws were considered part of the legal system of Muslim society across the Muslim world. As Peters has shown, basing himself on the abundant archives and other sources, particularly of the Ottoman period, there are many examples of the application of Islamic criminal codes.⁴⁸⁰ When new legal codes were introduced in many Muslim countries during the colonial period, the law of *ḥadd* was usually the first part of the traditional legal system that was abolished. As Peters writes,

the emergence of Western hegemony in the nineteenth century greatly affected the legal systems in the Islamic world. In most Islamic countries that came under European colonial rule, Shari‘a criminal law was immediately

⁴⁸⁰ Peters, in *Crime and Punishment in Islamic Law*, gives a detailed account of the classical doctrine and traces the enforcement of criminal law from the Ottoman period to the present day.

substituted by Western penal codes. In some other countries, however, this was a gradual process: there the final abolition of Islamic criminal law took place after a period of reform, during which Islamic criminal law continued to be implemented.⁴⁸¹

The periodic calls for the re-activation of Islamic criminal law, in particular *ḥadd* laws, in a number of Islamic countries reflect the fact that “from the 19th century onwards Islamic criminal justice had gradually retreated from the sphere of public law in the face of borrowing, and partial imposition of European laws until it was completely replaced by the latter in the majority of Muslim societies.”⁴⁸² Consequently, during the last quarter of the twentieth century a number of Muslim countries have experienced various degrees of secularisation of their legal system and so have taken gradual steps to ‘re-Islamise’ their criminal law systems by introducing Islamic criminal offences and sanctions (*ḥadd*) in their codified laws. Some Islamic regimes, such as the Republic of Iran, Pakistan, Sudan, and the

⁴⁸¹ Peters, *Crime and Punishment in Islamic Law*, pp. 3-4.

⁴⁸² Sidahmed, “Problems in Contemporary Applications of Islamic Criminal Law Sanctions: The Penalty for Adultery in Relation to Women”, p. 187. Cf. Peters: “From the late eighteenth century, Western powers extended their influence into the Islamic world. This resulted in the colonial conquest of Indonesia, India, North Africa and Central Asia, accompanied by a sharp increase in Western political and economic influence in countries that did not lose their independence. A few regions, such as the Arabian Peninsula, escaped Western expansion, because Western powers regarded them as devoid of economic or strategic interests. The nineteenth century was a period of drastic law reform in the Muslim world, due to two global factors. One was the Westernization of state and society, which entailed the adoption of Western laws. The other was indigenous: the emergence of modernizing states with centralized bureaucracies, both in the colonies and in the countries that had kept their independence. Such states needed a new legal system, and especially new systems of criminal law.” Cf. Peters, *Crime and Punishment*, p. 103.

Northern States of Nigeria, have re-introduced Islamic criminal law in place of Western criminal codes.

The proponents of the applicability of *ḥadd* punishments in contemporary Muslim society have constantly argued that there is no sound justification for suspending Islamic regulations that are specifically stipulated in the Qurʾān and Sunnah.⁴⁸³ The Islamist regimes aimed at establishing an Islamic state, and the main characteristic of an Islamic state, according to the Islamists, was to enforce Shariʿah in all domains, including *ḥadd* laws. Peters describes the re-introduction of the Shariʿah as having become the rallying cry of the religiously inspired political movement. As Peters argues, this idea of going back to the cultural roots and of imposing Islamic norms on society was appealing to large segments of the population that were opposed to the increasing Western political and overwhelming cultural influence.⁴⁸⁴

5.2.1 Saudi Arabia

The only Islamic country to have an uninterrupted application of Islamic Shariʿah is the Kingdom of Saudi Arabia.⁴⁸⁵ The Saudi government has

⁴⁸³ Ibid., p. 188.

⁴⁸⁴ Ibid., p. 144.

⁴⁸⁵ After the General Assembly of the United Nations had decided on the Universal Declaration on Human rights, in 1948, the Kingdom of Saudi Arabia strongly objected to the principle of religious liberty, particularly to the right to change one's religion, a right explicitly mentioned in Article 18 of the Declaration. Saudi Arabia eventually joined South Africa and six communist states and abstained from the vote. Heiner views the Saudis' attitude as "a reflection of the reluctance of a conservative Islamic government to endorse the emancipatory concept of human rights, a concept that is perceived to be alien and

officially announced and defined itself as an Islamic state in which all rules and regulations are according to the Islamic faith, whose primary sources are the Qurʾān and the Prophetic Sunnah. Accordingly, the government advocates that whatever decisions the government takes must be based on the rules and regulations of the Islamic Shariʿah, and that it should never violate a single rule of that Shariʿah.⁴⁸⁶

The Saudi government holds that the state must not interfere with the substantive laws of Shariʿah, particularly *ḥadd* laws. As al-Hageel writes, “Islam does not permit a nation to cancel or disregard any of the Shariʿah rules and regulations on the grounds that the people are the source of authority.”⁴⁸⁷ Al-Hageel warns that, once the ruling authority of the state exempts itself from adherence to the laws of Shariʿah, it will have committed a grave offence in Islamic Shariʿah. He further writes that the principle of the sovereignty of Islamic Shariʿah means

[that] the State is committed to the strict and full application of Islamic Shariʿah and to the preservation of its noble implications expressed through the protection of the religion, the self, the honor, the mind and the money of the Muslim and of the Islamic community. It further means that no one under no circumstances whatsoever, be he a ruler or a citizen, shall tamper with the State’s efforts to apply the Shariʿah law, to modify or adapt it. On the basis of this conviction, the Kingdom of Saudi Arabia, as an Islamic

detrimental to the Islamic tradition.” See Heiner, “Muslim voices in the Human Rights Debate”, p. 603.

⁴⁸⁶ Al-Hageel, *Human Rights in Islam and Their Applications in the Kingdom of Saudi Arabia*, p. 9.

⁴⁸⁷ Ibid., p. 35.

State, has committed itself to the strict and full application of the Islamic Shari‘ah, whose provisions and stipulations are being implemented in absolute sincerity and with adequate accuracy, thus complying with *Allāh*’s orders in seeking fulfillment of its people interests.⁴⁸⁸

In Saudi Arabia the Islamic criminal law stipulates that no punishment can be inflicted except for the crimes prohibited in the Qur’ān and specified in the Prophetic and juristic tradition. *Hadd* laws are to be seen as a constitutional issue “because the enforcement of these penalties in the Kingdom is based on explicit texts from the Holy Qur’ān and the Prophetic Sunnah”.⁴⁸⁹

According to *Amnesty International*, the nature of offences that are punished under Saudi criminal law is so wide-ranging that is hard to draw the line between morality and criminality: “these offences are regulated by a mixture of Shari‘ah... rules and government legislated laws, most of which are extremely vague and therefore open to abuse.”⁴⁹⁰ Furthermore, it has been reported that the death penalty under *hadd* law is invoked in at least three instances: for adulterers where the sentence is carried out by stoning; for apostasy; and for highway robbery when the offence results in loss of life, according to the majority of Islamic jurists. However, in Saudi Arabia people

⁴⁸⁸ Ibid., pp. 35-6.

⁴⁸⁹ Ibid., pp. 149-50.

⁴⁹⁰ A paper compiled and presented by *Amnesty International* for the 1st World Congress Against the Death Penalty (Strasbourg, 21-23 June 2001). See <http://www.middle-east-info.org/league/saudi/saudi.pdf>. Accessed on the 12/11/2010 at 11am.

have been executed for this latter offence even when it did not result in lethal consequences.⁴⁹¹

According to *Amnesty*, punishment by amputation (*qaṭʿ*) has been enforced in Saudi Arabia for offences mainly limited to cases of theft and highway robbery, where it is part of cross-amputation.⁴⁹² *Amnesty* have warned that the Saudi criminal law interpretation of “causing corruption on earth” of *ḥirāba* crimes, particularly in the absence of any clear definition, leaves the door open for the death penalty to be invoked even when offences do not result in lethal consequences.⁴⁹³ Likewise, the punishment of flogging has been mandatory in Saudi Arabia for a number of offences and can also be used at the discretion of judges as an alternative or in addition to other punishments.⁴⁹⁴

Amnesty International reports have recorded 90 judicial amputations between 1981 and December 1999 in Saudi Arabia, including at least five cases of cross-amputation, but the true number is probably much higher. It has been reported that on December 1999 two men were convicted

⁴⁹¹ Ibid., p. 2.

⁴⁹² “Saudi Arabia: Further Information in Fear of Amputation, Torture and other ill-Treatment”. Cf. <http://www.amnesty.org/en/library/info/MDE23/025/2008/en>. Accessed on the 12/11/2010 at 11am.

⁴⁹³ “Saudi Arabia: A Secret State of Suffering”, A paper compiled and presented by *Amnesty International* for the 1st World Congress Against the Death Penalty, p. 3. Cf. <http://www.middle-east-info.org/league/saudi/saudi.pdf>. Accessed on the 12/11/2010 at 11am.

⁴⁹⁴ “Flogging of Elderly Woman May Be Imminent”. Cf. <http://www.amnesty.org/en/library/info/MDE23/037/2009/en>. Accessed on the 12/11/2010 at 11am.

of highway robbery, each had a hand and a foot amputated in the city of Tabuk.⁴⁹⁵

The Islamisation of criminal law, in particular *ḥadd* laws in various countries and under different Islamist regimes, has not met with much opposition in other parts of the Muslim world. In most Islamic countries the Islamisation of the criminal law in places like Nigeria or Afghanistan was approved and supported by large segments of the Muslim society.⁴⁹⁶ As Peters points out, this has been due to “the powerful ideological discourse surrounding it, which holds promises for the ordinary people.”⁴⁹⁷

In fact, the Islamisation of criminal law in several Islamic countries, over the last forty years or so, has proven to be the favourite task of self-styled Islamic regimes, whether new in power or long established. The message conveyed in such re-Islamisation reforms is that an immediate start is made to construct a ‘real’ Islamic state where the law ‘fits’ the Islamic society. To enhance political power, religious legitimacy has become a crucial ingredient of government in many parts of the Muslim world; hence, the Islamisation of Islamic law is, for many governments, an effective tool. In reference to the reintroduction of Islamic criminal law, since 1972 seven countries have enacted legislations to reintroduce Islamic criminal law.

⁴⁹⁵ “Saudi Arabia: A Secret State of Suffering”, A paper compiled and presented by *Amnesty International* for the *1st World Congress Against the Death Penalty*, p. 12. Cf. <http://www.middle-east-info.org/league/saudi/saudi.pdf>. Accessed on the 12/11/2010 at 11am.

⁴⁹⁶ Peters, *Crime and Punishment in Islamic Law*, p. 146.

⁴⁹⁷ *Ibid.*, p. 146.

Libya, Pakistan, Iran, Sudan, and North Nigeria have fully re-introduced Islamic criminal law. Also the United Arab Emirates (1978) have passed Islamic criminal laws and the Malaysian state Kelantan (1993). However, these laws were either never effective, not having been approved by the federal government,⁴⁹⁸ or they were limited to the criminal cases of homicide and wounding.

5.2.2 Libya

Islamic criminal law came into force as soon as Colonel Ghadafi seized power in Libya in 1969. He promulgated that Islam and Islamic law would be the only source of inspiration for him and his militant supporters.⁴⁹⁹ *Ḥadd* codes were legislated between the period of 1972 and 1974, during which period the Libyan legislative committee announced four *ḥadd* offences: theft and robbery (Law 148 of 11 October 1972), illegal sexual intercourse (Law 70 of 20 October 1973), unfounded false accusation of fornication (Law 52 of 16 September 1974), and the drinking of alcoholic beverages (Law 89 of 20 November 1974). *Ḥadd* laws essentially follow the Mālikī doctrine, the prevailing school in Libya and North Africa, but are to some degree ‘modernized’. Peters monitors the deviation of Libyan legislation of *ḥadd* laws from classical doctrine. As he notes,

⁴⁹⁸ Kamali, “Punishment in Islamic Law”, pp. 203-234.

⁴⁹⁹ “Inclusion of the judicial punishments of amputation and flogging in the penal code”. Cf. <http://www.amnesty.org/en/library/info/MDE19/002/1994/en>. Accessed on the 12/11/2010 at 11:30 am.

criminal responsibility begins at the age of eighteen and not at puberty as in the classical doctrine. Second, a bandit who has not taken property or another person's life is sentenced to imprisonment instead of banishment and a bandit who has both killed and plundered is punished with the death penalty only and his body is not publicly exposed (crucified) (art. 5, Law 184/1972). Third, if a person who has already been punished with amputation commits a second theft or banditry, he will not be sentenced to further amputations but to imprisonment until he repents, with a minimum of three years (art. 13, Law 148/1972). Further, unlawful sexual intercourse is only punished with flogging, and not with stoning to death.⁵⁰⁰

5.2.3 Pakistan

In 1977 General Zia ul-Ḥaqq, supported by the Islamist organisation *al-Jamā'a al-Islāmiyya*, seized power over Pakistan. In 1979 he promulgated a program of Islamisation of Pakistan's criminal law. The Pakistani Constitution was amended by adding article 203-D, which established a Federal Shari'ah Court that must examine "whether or not any law or provisions of a law is repugnant to the injunctions of Islam, as laid down in the Qur'ān and the Sunnah and can rescind laws found to be in conflict with Islam."⁵⁰¹

After the first announcement of the re-Islamisation of the Pakistani criminal law in 1979, it is reported that special courts for speedy trials began operating on 31 August 1991. A constitutional amendment adopted by the Pakistani parliament in July 1991 empowers the federal government of Pakistan to set up such courts to ensure quick prosecution of offences. On the

⁵⁰⁰ Peters, *Crime and Punishment*, p. 154.

⁵⁰¹ Ibid., p. 155.

10th of February 1979, President Zia-ul-Haqq promulgated four ordinances, collectively referred to as the “Hudood Ordinances” which were crafted to make significant revisions in Pakistan’s criminal law system. The intent of the ordinances, as stated by president Zia, was to bring Pakistan’s legal system into conformity with the precepts of Islam.⁵⁰²

The Pakistani criminal laws follow the classical, mainly Ḥanafī, doctrine. Fixed *ḥadd* punishment can only be carried out if the Federal Shari‘ah Court tries the case. In cases of banditry, the punishment for merely frightening persons, without killing or taking property, is not exile, but a maximum of thirty lashes and imprisonment of at least a maximum of three years. As against classical doctrine, exposure of the dead body (crucifixion) is not mentioned as an additional punishment in cases of banditry with homicide and plunder. The Islamic rules concerning unlawful sexual intercourse are identical with the classical doctrine. Rape (*zinā bi-l-jabr*), defined as intercourse with a man or woman without or against her/his consent if this has been obtained under duress or by fraud, is mentioned as a separate offence, with the same punishment as that for unlawful sex, if proven according to Shari‘ah.⁵⁰³

⁵⁰² Charles H. Kennedy, “Islamization in Pakistan: Implementation of the Hudood Ordinances”, *Asian Survey* 28,3 (1988), p. 307; Quraishi, “Her Honour: An Islamic Critique of the Rape Laws of Pakistan From A Woman’s Perspective”, p. 288.

⁵⁰³ Cf. Waqar al-Huaq, *Islamic Criminal Laws: Hudood Rules and up to Date Commentary*.

The Pakistani way of enforcing Islamic criminal law has been careful and controlled, except with regard to blasphemy laws.⁵⁰⁴ Amputation and death by stoning have not been inflicted; only flogging is frequently practiced. Peters views the implementation of *ḥadd* in the Pakistani case to have a symbolic character and not to have resulted in a drastic change of the penal system.⁵⁰⁵

5.2.4 Iran

Soon after the Islamic revolution in Iran at the beginning of 1979, Islamic special courts were set up. The Iranian revolutionary courts did not define specific crimes of a political nature. As early as 1981, the revolutionary courts began to try sexual offences and other *ḥadd* crimes, and the first sentences of amputation and stoning were carried out. In 1982 and 1983 four laws were enacted to codify Islamic criminal law. The law concerning *ḥadd* and other relevant provisions is based on Shi'is doctrine.⁵⁰⁶ According to the Iranian civil code, criminal liability begins at puberty which is set at nine years for girls and fifteen years for boys.⁵⁰⁷

⁵⁰⁴ Cf. Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan: Shari'ah in Practice*. Leiden: Brill, 2009.

⁵⁰⁵ Peters, *Crime and Punishment in Islamic Law*, p. 169.

⁵⁰⁶ Peters notes that “[a]postasy is not mentioned as a *ḥadd* crime. This however, does not mean that an apostate is left without a punishment. Since article 289 of the code of criminal procedure lays down that sentences in criminal matters must mention that article on which the conviction is founded but that the courts must apply the Shari'ah in cases in which the code does not give a ruling. Death sentences for apostasy have been pronounced on the strength of this rule.” See Peters, *Crime and Punishment*, p. 160.

⁵⁰⁷ Ibid., p. 160

The definition of the offence of armed disturbance of the peace has been clearly expanded by the Iranian legal authorities to include a number of offences, particularly of a highly political character, such as membership of groups espousing armed rebellion, planning and financially supporting the overthrow of the Islamic government and willingness to occupy important posts in a government after the overthrow of the Islamic regimes. These acts can, therefore, be punished with death, crucifixion and cross-amputation. The penalty for drinking alcoholic beverages is eighty lashes.⁵⁰⁸ Reports by human rights organisations indicate that all punishments mentioned in the law are actually applied, with the possible exception of crucifixion, although the criminal code mentions this punishment, which consists of tying the convict to a cross, leaving him there three days and taking him down after that period, even if he has not died in the mean time.⁵⁰⁹

Human rights organisations have reported numerous instances of stoning, judicial amputations and floggings, sometimes carried out before the execution of a death sentence.⁵¹⁰ Compared to Saudi Arabia, many sentences of amputation and stoning have been given, especially during the first decade after the Iranian revolution.

In view of the many restraints established in traditional *fiqh* on the application of *ḥadd* punishments it is doubtful whether all these judgments were obtained in conformity with Shari'ah, which stipulates, for example,

⁵⁰⁸ Ibid., p. 162.

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid.

that testimonies and confessions made under duress are not valid. Since the testimonies of eyewitnesses are generally difficult to find, it seems evident that most sentences were pronounced on the strength of confessions and that one may have justified doubts as to whether these were obtained without undue pressure, as heavy reliance on confession as a means of proving crime can be an incentive for the police to apply torture to the suspect during the preliminary investigation. Generally speaking, punitive practices in Iran became highly politicised after the revolution. Thus, *ḥadd* punishments were used by the revolutionary courts to suppress any form of oppression.⁵¹¹

A recent example of the application of *ḥadd* laws in Iran is the by now famous case of Sakinah Ashtiani, a 43 year-old mother of two. She is currently being held on death row. She was convicted in May 2006 of having illicit relationships with two men and received 99 lashes as her prescribed sentence. Despite the scourging, she was then also convicted of adultery while married, a charge she is reported to have denied, and is now sentenced to death by lapidation. The following report about her trial has been made available through *Amnesty International*:

During her trial, Sakineh Mohammadi Ashtiani retracted a ‘confession’ that she had made during her pre-trial interrogation. Sakineh alleged that she had been forced to make the ‘confession’ under duress, and denied the charge of adultery. Two of the five judges found her not guilty, noting that she had already been flogged and adding that they did not find the necessary proof of adultery in the case against her. However, the three other judges - including the presiding judge - found her guilty on the basis of

⁵¹¹ Ibid, pp. 163-4.

‘the knowledge of the judge’, a provision in Iranian law that allows judges to make their own subjective, and possibly arbitrary, determination whether an accused person is guilty even in the absence of clear or conclusive evidence. Having been convicted by a majority of the five judges, Sakineh Mohammadi Ashtiani was sentenced to death by stoning.⁵¹²

Following an international outcry against her sentence, the Iranian Embassy in London publicly stated that Sakineh Ashtiani would not be executed by stoning; however, there has been no mention of any other possible means of execution.⁵¹³

Years before Sakineh Ashtiani’s case, under the presidency of Mohammad Khatami (1997-2005), the Iranian government seemed to be moving toward the abolition, or at least the permanent adjournment, of some of the more extreme aspects of the law of *ḥadd*. In 2002, the Iranian Head of the Judiciary instructed judges to impose a moratorium on stoning penalty. Despite this, at least five men and one woman have been stoned to death since 2002. In January 2009, the Spokesperson for the Judiciary, Ali Reza Jamshidi, confirmed that two executions by stoning had been carried out in December 2008 and said that the directive on the moratorium had no legal weight and that judges could therefore ignore it.⁵¹⁴

5.2.5 Sudan

512 “Iran: Execution by Stoning”. Cf. <http://www.amnesty.org/en/library/info/MDE13/095/2010/en>.

⁵¹³ Ibid.

⁵¹⁴ Ibid.

The Sudanese committee for law revision was set up 1977 to prepare for the Islamisation of the Sudanese criminal law. However, the proposals drafted by the committee were shelved. Soon afterwards, in September 1983, the introduction of Islamic legislation came into active play.⁵¹⁵ The main characteristic of the 1983 legislation of criminal code is the outright deviations from the classical *fiqh*, for instance, applying Islamic criminal law to Muslims and non-Muslims alike. Moreover, as Peters notes, those who drafted the 1983 Penal Code evidently wanted to extend the scope of fixed punishments. This was done by broadening the definitions, by applying fixed punishments to offences other than the traditional *ḥadd* crimes, and by relaxing the rules of evidence. For instance, the definition of theft was wider than the classical one. This implies that the scope of behaviour punishable by amputation was greatly extended.⁵¹⁶ Moreover, circumstantial evidence is now admitted in many cases. For instance, the pregnancy of an unmarried woman functions as evidence of the offence of unlawful sexual intercourse, and possession of stolen goods is accepted as evidence of theft.

In light of the severe criticism of the 1983 criminal code, the Sudanese had to re-introduce a new criminal code; this was legislated in January 1991. This criminal code stipulates that, for the time being, the provisions regarding drinking and trading in alcohol, apostasy, theft, false accusation of illegal sexual relation and the punishments for unlawful sexual

⁵¹⁵ Cf. Shamil Jeppie, "Sharia and State in the Sudan: From Late Colonialism to Late Islamism", *Religion as a Social and Spiritual Force*. Edited by: Meerten B. Ter Borg and Jan Willem Van Henten (New York: Fordham University Press, 2010).

⁵¹⁶ Peters, *Crime and Punishment*, pp. 165-6.

intercourse and retaliation will not be applied in the South. According to Peters, criminal liability begins with puberty, but not before the age of fifteen and no later than the age of eighteen.⁵¹⁷

Peters argues that the new Sudanese criminal code is more in agreement with the classical doctrine than the initial code, especially with regard to the definitions of the *ḥadd* offences. However, since the 1983 Evidence Act with its relaxed standards of proof for *ḥadd* offences remains in force, *ḥadd* offences can be easily established in court. Indeed, such punishments are still being enforced. For example, on 25-27 January 2001, five men suffered cross-amputation after being sentenced for banditry. There are no indications that the government or the judiciary want to put an end to the enforcement of the severe *ḥadd* punishments.⁵¹⁸

5.2.6 Nigeria

According to *Amnesty International*, new Shari'ah criminal codes have come into force in 12 states in Northern Nigeria since 1999.⁵¹⁹ The

⁵¹⁷ Ibid., p. 168.

⁵¹⁸ Cf. <http://www.amnesty.org/en/library/info/AFR54/033/2004/en>. Accessed on the 12/11/2010 at 11:30 am.

⁵¹⁹ Nigeria is an African Federal Republic of 36 states and one federal capital territory (Abuja). The states are further subdivided into 589 local government areas. The federal government defines and monitors national policy, while state and local governments are charged with implementing such policies. However, each state has its own government, law and judiciary. Nigeria has three major penal legislations coexisting. They consist of the Penal Code and the accompanying Criminal Procedure Code Cap 81 Laws of the Federation 1990 (ACP), the Criminal Code and the accompanying the Criminal Procedure Act Cap 80 laws of the Federation 1990 (CPA) and the Shari'ah Penal Legislation (26) in 12 northern states

organisation is aware of at least 11 death sentences handed down since 1999 by Shari'ah courts in the States of Bauchi, Jigawa, Katsina, Niger, and Sokoto; in four of these the convicted have been women.⁵²⁰ *Amnesty International* reported the most recent woman convicted of adultery as Fatima Usman who received her death sentence in May 2002 from the Shari'ah court of Gawu-Babangida.

However, at present, nobody sentenced to death for adultery under the new Shari'ah criminal legislation has yet had their sentence carried out.⁵²¹ According to *Amnesty International's* investigation, poor, illiterate, rural women who do not conform to social norms and have had a pregnancy outside marriage appear to be at particular risk of being charged with capital offences in all the criminal systems of Nigeria.⁵²² The death penalty has been introduced under *hadd* codes for criminal offences such as adultery (53), rape (54) and sodomy (59). The punishment for the aforementioned offences is execution by stoning.⁵²³ Cases attracting capital punishments, for instance adultery, are tried by the lower Shari'ah courts. Furthermore, the right of

including both laws defining criminal offences and their punishments. The foregoing also applies to those states that have adopted the accompanying criminal procedure codes.

⁵²⁰ "Cruel, Inhumane and Degrading Punishments", *Amnesty International Annual Report Entries on Nigeria 1968-2010*, (London: Amnesty International Publications, 2010), pp. 71-5.

Cf. <http://www.amnesty.org/en/library/asset/AFR44/018/2010/en>. Accessed on the 12/11/2010 at 11:30 am.

⁵²¹ *Ibid.*, p. 77.

⁵²² *Ibid.*

⁵²³ *Ibid.*

appeal to an upper Shari‘ah court is guaranteed in all the Shari‘ah criminal procedure codes.

The Nigerian state of Zamfara, a state in the predominantly Muslim north, has enacted its own legislation in the domain of criminal law.⁵²⁴ Islamic criminal law was introduced on 27 January 2000 when the first Shari‘ah criminal code in North Nigeria was enacted, after the establishment of Shari‘ah courts to implement it. Calls for the Islamisation of criminal law has been viewed as a reaction against the centre of gravity of Nigerian politics which had moved to the mainly non-Muslim south. This is viewed as a challenge to federal politics and an attempt to reassert Muslim political power. Furthermore, there was a widespread belief that imposing Islamic norms on public life, by banning the drinking of alcohol and by putting an end to prostitution, would secure God’s help in making the Nigerian Muslims stronger. The codes include the Mālikī doctrine of *ḥadd* and other relevant offences.⁵²⁵

⁵²⁴ Peters points that “the reintroduction of Islamic criminal law in Northern Nigeria is constitutionally more complicated than its implementation elsewhere. Nigeria is a multi-religious state, and the Federal Constitution explicitly forbids the federation of state to accept an official state religion. Among Nigerian constitutional lawyers there is disagreement about whether or not the implementation of Shari‘ah criminal law can be seen as the adoption of a state religion.” See Peters, *Crime and Punishment*, p.170.

⁵²⁵ According to a report by *Amnesty International*, “the dominant Mālikī interpretation of Shari‘ah in Nigeria considers pregnancy as a sufficient evidence to convict a woman for adultery. The oath of the man denying having had sexual intercourse with the woman is considered sufficient proof of his innocence unless four independent and reputable eye-witnesses declare his voluntary involvement in the act of sexual intercourse.” Cf. <http://www.amnesty.org/en/library/asset/AFR44/018/2010/en>. Accessed on the 12/11/2010 at 11:30 am.

5.3 Debates about *ḥadd* punishments today: four key arguments

On this backdrop of the re-Islamisation of criminal law in a number of Islamic countries, let us turn to contemporary debates that reflect this new situation. Four main issues have emerged as the key concerns of contemporary Muslim scholars when they express themselves about the applicability as well as the current implementations of *ḥadd* punishments. Each of these four camps has its own definition of correct ethical behaviour. Hence, each speaks of the gravity of the *ḥadd* offence in different terms. For example, there are those who insist on the special seriousness of *ḥadd* offence and therefore, stress that *ḥadd* punishments are justified because they correspond to a uniquely Islamic system of specific moral values. Such voices emerge mostly from the Salafi, conservative and traditionalist camps. In the following, I offer an overview of key discussions of *ḥadd* and their punishments in the modern period.

My aim here is to examine the main driving forces behind the current demands for the expansion of the Islamic Shari‘ah law into criminal law, demands which contrast sharply with the modernists’ view of *ḥadd*, which calls for acknowledging historical change and the contextual nature of *ḥadd* laws, and therefore, the limits in interpreting the scriptural evidence for *ḥadd*. In the debates of contemporary Muslim scholars there are thus two main contradictory stances. On the one hand, we find the proponents of Shari‘ah calling for the re-implementations of *ḥadd* punishments. These punishments, as they argue, are explicitly dictated in the Qur’ānic text and

the Prophetic tradition. On the other hand, we find the modernists' calls for a moratorium on *ḥadd* laws while simultaneously attempting to find solutions for the contemporary challenges that are facing the current implementation of *ḥadd* punishments. As I suggest, each camp views God's aims behind the legislation of *ḥadd* punishment differently. For this reason, their discussion is quite rich and thus invites detailed examination.

5.3.1 Pro-*ḥadd* arguments

Contemporary defenders of *ḥadd* punishments usually make recourse to issues of cultural authenticity, that is, the need to preserve Islam's heritage (which includes *fiqh*). They also emphasize that *ḥadd* norms are deeply anchored in Islamic ethics, to the point that the whole edifice of Islamic ethics will collapse if one abandons that position that *ḥadd* punishments continue to be relevant and applicable in today's society. In the context of each of these two foci of the pro-*ḥadd* line of argumentation, I shall highlight a number of positions taken by some of the outstanding authors writing about the topic.

5.3.1.1 *Ḥadd* punishments as an expression of cultural and religious authenticity

'Cultural and religious authenticity' is one of the key words that are most often associated with the justification of *ḥadd* punishments in the postcolonial period. As was mentioned before, Salafis and conservatives have claimed that the *ḥadd* penalty associated with each crime is divinely

ordained, and therefore, it is presumed that it is impermissible to alter, reduce or increase it, since it is a penalty stipulated by a divinely revealed text.⁵²⁶ Reinforcing this claim is the belief that the philosophy of Islamic punishments is essentially different from and highly superior to the penal philosophy advanced by Western criminologists.⁵²⁷ Heiner highlights that Western thinkers often reject Western human rights-driven proposals for the modification of Islamic criminal law on the grounds that these proposals are imposed by force rather than being in natural harmony with the ‘native’ interests of Muslim peoples. As he notes, “Muslim conservatives frequently have perceived any commitment to the implementation of human rights as a new Western ‘crusade’. That is, they fear that human rights are part and parcel of an all encompassing ideology or way of life that is intended to eventually replace Islamic faith and practice.”⁵²⁸

Consequently, Salafis and conservatives have viewed *ḥadd* punishments as the re-assertion of cultural authenticity. The espousal of *ḥadd* is stylized as “the pious choice of Muslims – both rulers and ruled – to submit themselves to the divinely ordained laws of the Shari‘ah instead of man made regulations.”⁵²⁹ This alleged authenticity is drawn from the Qurʾānic teachings and the Prophetic practice, both of which are of course assumed to be authentic, and to preserve a kind of meta-historical, eternal truth

⁵²⁶ Al-Hageel, *Human Rights in Islam and Their Applications*, p. 12.

⁵²⁷ Qadri, *Islamic Penal Law and Philosophy*, p. 489.

⁵²⁸ Bielefeldt, “Muslim Voices in the Human Rights Debate”, p. 616.

⁵²⁹ Sidahmed, “Problems in Contemporary Applications of Islamic Criminal Sanctions”, p. 187.

particular to Islam and Muslims. Conservatives and Salafis regularly call for the re-implementations of *ḥadd* laws, as these calls are based on the assumption that Islamic criminal law is part of the essence of Islam. For instance, the call for implementing the stoning penalty for unlawful sexual relations, according to them, is based on the idea that this punishment belongs to Islam as a historical fact.⁵³⁰ In Pakistan, the intent of the Islamisation of the Pakistani legal law, as stated by president Zia, is to bring Pakistan's legal system closer to the precepts of Islam.⁵³¹ In the Nigerian case, the Shari'ah courts are hailed for the opportunity they provide "to submit totally to their Islamic cultural heritage, which always remain in force as an ideal and final court of appeal".⁵³²

An important advocate of the application of *ḥadd* law in Nigeria is Anyanwu Ogechi, whose basic premise is that "[b]y its comprehensiveness Shari'ah forms the main unifying force in Islamic culture, and affirms the 'collective representations' that hold members of the society together."⁵³³ Ogechi attempts to justify the implementation of *ḥadd* punishments within modern Islamic societies. As he argues, "in modern societies, the criminal justice system not only produces social solidarity by reaffirming the society's bond and its adherence to certain norms, but also serves to legitimize the

⁵³⁰ See Qadri, *Islamic Penal Law and Philosophy*, p. 489.

⁵³¹ Charles H. Kennedy, "Islamization in Pakistan: Implementations of the Hudood Ordinances", *Asian Survey* 28,3 (1988), p. 307.

⁵³² Anyanwu Ogechi, "Crime and Justice in Postcolonial Nigeria: The Justifications and Challenges of Islamic Law of Shari'a", *Journal of Law and Religion* 21,2 (2005/2006), p. 315.

⁵³³ Anyanwu Ogechi, "Crime and Justice in Postcolonial Nigeria", p. 336.

political authority of the state.”⁵³⁴ Ogechi describes the calls of the Salafis and conservatives for applying Shari‘ah as “essentially a product of an historic desire by Muslims to rescue their society from sliding into moral decay and losing its identity.”⁵³⁵ In reference to the Nigerian case, Ogechi states that the implementation of Islamic criminal law is a “reassertion of Islamic identity, which the British undermined during the colonial period [...] the Shari‘ah embraces a system of meaning that linked Muslims to their rural and pre-capitalist origin (pre-colonial).”⁵³⁶

Ogechi observes that the justice system of any society has to reflect its traditions, customs and religious beliefs, and that the full meaning, importance and implication of Shari‘ah must be grasped before we can pass judgment about the ‘relevance’ of Shari‘ah law in countries such as Nigeria.⁵³⁷ He continues by stating that “the way that a particular society punishes reflects its culture and structures the way that people think about criminals, which provides the intellectual framework through which they judge individual behavior and recognize offenders.”⁵³⁸ Therefore, the implementation of Islamic Shari‘ah, particularly *ḥadd* punishments, is described as necessary for the reason that Shari‘ah is “not optional”, given that it is “a question of religion and not politics.”⁵³⁹ Concluding his line of

⁵³⁴ Ibid., p. 315.

⁵³⁵ Ibid., p. 317.

⁵³⁶ Ibid.

⁵³⁷ Ibid., p. 320.

⁵³⁸ Ibid., p. 321.

⁵³⁹ Ibid., p. 329.

thought, Ogechi views Shari'ah as a way of life for Muslims, and its criminal law provisions are no exception to this rule.⁵⁴⁰ Ogechi proposes that “any time members of Muslim society participate in punishment, they reaffirm their faith in the system.”⁵⁴¹

This explicit linkage of *ḥadd* punishments with the culture and identity of Muslims has been widely rejected by contemporary modernists, and Western human rights organizations.⁵⁴² On the other hands, the Salafis and conservatives completely reject such criticism. They regard any such Western criticism as an interference and absolute violation of the internal affairs of Muslims. Their attitude towards human rights is to reject it as an alien concept that is basically hostile to their own traditional culture.⁵⁴³ For instance, al-Hageel views Western criticism of the current implementation of *ḥadd* punishments in Saudi Arabia as “unacceptable, unjustified interference in its [Saudi Arabia’s] internal affairs, in fact, it is forbidden according to the statues of international law.”⁵⁴⁴ Accordingly, he views the current calls for

⁵⁴⁰ Ibid., p. 341.

⁵⁴¹ Ibid., p. 335.

⁵⁴² Bielefeldt writes: “What seems problematic is the widespread presumption – be it explicit or implicit – that human rights belong exclusively to the Christian tradition. On this problematic view, the universality of human rights becomes tantamount to the universal religious mission of Christianity. At the same time, the emancipatory claim of equal rights of freedom might be distorted by premature harmonization with more traditional and authoritarian Christian concepts.” See Bielefeldt, “Muslims in the Human Rights Debate”, pp. 587-617.

⁵⁴³ Ibid., p. 601.

⁵⁴⁴ Al-Hageel, *Human Rights in Islam and Their Applications*, p. 150.

nullifying the Islamic penal law as “a blatant call for the violation of human rights.”⁵⁴⁵

Salafis and conservatives constantly accuse the West of interfering in the internal affairs of the Muslims, but, as they claim, “before hurling abuses and insults against Islamic punishments, they [the West] should first probe into their own blood stained hatred-hewn and jealousy-prone hearts.”⁵⁴⁶ There is a strong tendency among scholars of both camps to perceive Western criticism as “directed against the teachings of Islam per se rather than any political system.”⁵⁴⁷ In practice, Ogechi views the British implemented law in Nigeria as “[...] intended to suffocate Islamic law.”⁵⁴⁸

It is clear that Salafis and conservatives judge *ḥadd* punishments to be not in the least as cruel and terrible as they have been portrayed by Western human rights organisations. As al-Hageel claims, “these penalties are not as terrible as they are portrayed by the enemies of Islam who work to defame the reputation of Islam and its followers.”⁵⁴⁹ Conservatives and Salafis also like to point out that “it is easy to forget the even in Western countries, until comparatively recently, the law condoned punishments at least as severe and sometimes even more horrible than the *ḥadd* punishments.”⁵⁵⁰ Clearly, Salafis and conservatives have perceived the current criticism against Islamic penal

⁵⁴⁵ Ibid., p. 149.

⁵⁴⁶ Qadri, *Islamic Penal Law and Philosophy*, p. 508.

⁵⁴⁷ Al-Hageel, *Human Rights in Islam and Their Applications*, p. 9.

⁵⁴⁸ Ogechi, “Crime and Justice in Postcolonial Nigeria”, p. 320.

⁵⁴⁹ Al-Hageel, *Human Rights in Islam*, p. 149.

⁵⁵⁰ Hussain, *Islamic Law and Society: An Introduction*, p. 139.

law as “absolutely baseless, false, and biased”, and “rooted either in sheer ignorance or scholastic dishonesty.”⁵⁵¹

There is a strong tendency to believe that the proponents of *ḥadd* punishments rely only on the Qurʾānic injunctions and the Prophetic practice in order to defend their calls for re-implementing *ḥadd* punishments in the Muslim world. Assuming the specific offences and sanctions prescribed in the primary sources of law in the Qurʾān and the sunnah, proponents of Shariʿah insist on arguing that there is no acceptable justification for suspending regulations that are specifically outlined in these divine sources.⁵⁵² Such a firm belief that *ḥadd* punishments are clearly and unequivocally prescribed in revelation, and not subject to further interpretation or negotiation, of course is highly problematic in any discussion about the feasibility to reform Islamic law, including its *ḥadd* provisions. As Heiner suggests, in order to overcome the defensive attitude towards human rights, Muslims must scrutinise the sources of the Islamic tradition and of modernity critically. Such critical probing of the scriptures of Islam leads Abou El Fadl, for example, to identify parts of the tradition that, while adequate and applicable in past periods of Islamic history, have become incoherent or fundamentally inconsistent with the very basic assumptions of revelation. Abou El Fadl accepts the divine nature of the Qurʾān and sees no inconsistency or rupture in accepting the

⁵⁵¹ Qadri, *Islamic Penal Law and Philosophy*, p. 516.

⁵⁵² Sidahmed, “Problems in Contemporary Applications of Islamic Criminal Sanctions”, p. 188.

idea of a text protected by God from human alterations or redactions.⁵⁵³ Qurʾānic revelation came to express God’s purposes for humanity in a specific sociocultural context, but is not applicable one-to-one to the contemporary context in which Muslims live. In the words of Johnston, Abou El Fadl “has gone beyond the modern quest for certainty (typified by Descartes) and adopted the post modern episteme and hermeneutic that define truth as an interactive dynamic between revelation, human reflection upon nature and creation, and human perception of socio-historical experience.”⁵⁵⁴ Abou El Fadl’s main argument about the Qurʾān being an authoritative source of law but still in need of creative interpretation is embodied in this statement:

The Divine Will is the ultimate source of all authority and the authoritative is whatever the reader (or agent) is willing to defer to and is willing to treat as an exclusionary factor in all relevant determinations. Accordingly, for a believer in the juristic paradigms, the instructions containing the indicators of God’s Will are authoritative (i.e. the Qurʾān and Sunnah). Furthermore, any interpretive community or individual that bases itself on the deciphering and understanding of the Divine instructions is authoritative as long as the believer is willing to trust that such a community or individual has discharged its obligations of honesty, self-restraint, diligence, comprehensiveness, and reasonableness [...] authoritativeness is a function of deferment of judgement based on the conditions of trust. This, in my view, is the normative process of authoritativeness in Islam.⁵⁵⁵

As Abou El Fadl suggests, studying the sources of Islamic tradition cannot consist in simply applying traditional principles unquestioningly, but

⁵⁵³ Abou El-Fadl, *Speaking in God’s Name*, p. 105.

⁵⁵⁴ Johnston, “Maqāṣid Al-Sharī‘ah”, pp. 185-186.

⁵⁵⁵ Abou El-Fadl, *Speaking in God’s Name*, pp. 132-3.

might still provide critical insights into modernity. As he recommends, one should refrain from all claims of exclusivity with regard to human rights, and he suggests that in fact the Islamic tradition may have its own resources to build a discourse of human rights. The creation of “an overlapping normative consensus in order to coexist peacefully on this small globe” is only possible if human rights are truly and fully understood as “the privilege of the whole of humanity, or a normative demand directed to the different peoples, cultures, and religions”.⁵⁵⁶

5.3.1.2 *Ḥadd* as part of an Islamic ethics

A fundamental principle (*aṣl*)⁵⁵⁷ of Islamic jurisprudence is that actions are permissible if not qualified otherwise. Al-Qaraḍāwī states that to make lawful and to prohibit things is a prerogative that belongs to God alone. Nothing is prohibited except what is prohibited by a sound and explicit text (*naṣṣ*) from the Lawgiver. The traditionalists argue that the prohibition of things is primarily due to their impurity and harmfulness.⁵⁵⁸ According to the majority of contemporary Muslim jurists, the offences prohibited in the Qurʾān are all considered as unethical behaviour, and therefore, their punishments are established as the means of promoting the moral values and

⁵⁵⁶ Heiner, “Muslim Voices in the Human Rights Debate”, p. 602.

⁵⁵⁷ *Aṣl* (pl. *uṣūl*) denotes the origin, source, foundation, basis, or fundamental principle. See EI, M.G, Carter, “Uṣūl (a)”, *Encyclopedia of Islam, Second Edition*, vol. x, p. 928b.

⁵⁵⁸ Al-Qaraḍāwī, *The Lawful and the Prohibited in Islam*, p. 3.

general welfare of human society.⁵⁵⁹ Abolishing the punishments dictated for exceeding the limits prescribed in the Qurʾān is regarded as one of the most serious forms of disobedience, which is claimed to lead to harm both in this world and the next.⁵⁶⁰ Furthermore, the Prophetic tradition is viewed as a kind of “handbook of Islamic ethics, inasmuch as in the general Muslim view the correct performance of religious duties and the right understanding of religious doctrine are inseparable elements of the moral life.”⁵⁶¹ As Serajzadeh writes,

[i]f Islamic penal law – as part of Shariʿah – has had a real prohibitive effect on crime, it is not simply because it is applied as formal penal law. It is mainly because the complex of religious ideas to which it belongs has had a great influence on the mentality of Muslims [...] Islamic penal law has had its prohibitive effect on crime as a normative system respected by Muslims, and not just as penal law that threatens offenders.⁵⁶²

Traditionalists, Salafis, and conservatives unanimously agree that *ḥadd* provisions carry a fundamental importance for the constitution of an Islamic ethics based in revelation. Modernist voices, on the other hand, are conspicuously absent in this argument.

⁵⁵⁹ Qadri, *Islamic Penal Law and Philosophy*, p. 489.

⁵⁶⁰ Al-Hageel, *Human Rights in Islam*, p. 154.

⁵⁶¹ R. Walzer, “Akhlāq”, *Encyclopedia of Islam, Second Edition*, vol. I, p. 325b.

⁵⁶² Serajzadeh, “Islam and Crime the Moral Community of Muslims”, p. 125.

To commit any of the offences explicitly forbidden in revelation is a crass instance of sinful behaviour. Thus, the Islamic criminal system (*al-niẓām al-jināʿī*) aims at protecting as well as maintaining the ethical interests of Muslims as stipulated in the Qurʾān.⁵⁶³ Abū Zahra argues that the purpose of Islamic punishments is to protect the ethics and the public interest (*maṣlaḥa*) of the Muslim community.⁵⁶⁴ The traditionalists hold that the public welfare is the primary aim (*maqṣad*) of the Islamic Shariʿah; hence, it is mandatory that it is guarded and protected at all times.⁵⁶⁵ *Ḥadd* punishments are thus projected as the solution to the misfortunes, upheavals and injustices that have plagued the modern Islamic world.⁵⁶⁶

It seems that *ḥadd* offences are considered especially grave because of their potential to undermine the “five objectives of the Law” (*maqāṣid al-Shariʿah al-khamsa*). According to Gleave, “the term is used in works of legal theory (*uṣūl al-fiqh*) and refers to the idea that God’s law, the Shariʿah, is a system which encompasses aims or purposes. If the system is correctly implemented, these aims will be achieved.”⁵⁶⁷ As Gleave states, “most Sunnī legal theorists subscribe to the view that Shariʿah has aims and principal amongst these is the promotion of the benefit for the believers.”⁵⁶⁸

⁵⁶³ Oqla, *Niẓām al-Islām: al-ʿIbāda wa al-ʿUqūba*, p. 104.

⁵⁶⁴ Abū Zahra, *Al-Jarīma wa al-ʿUqūba fī al-Fiqh al-Islāmī: al-ʿUqūba*, p. 37.

⁵⁶⁵ *Ibid.*, p. 43.

⁵⁶⁶ Ogechi, “Crime and Justice in Postcolonial Nigeria”, p. 320.

⁵⁶⁷ Gleave, “Maḳāṣid al-Shariʿh (a)”, p. 569b.

⁵⁶⁸ *Ibid.*, p. 569.

In reference to fornication and adultery, al-Qaraḍāwī explains the strictness of Islamic law in prohibiting *zinā* by pointing out that it “leads to confusion of lineage, child abuse, the breaking up of families, bitterness in relationships, the spread of venereal diseases, and a general laxity in morals; moreover it opens the door to floods of lust and self-gratification.”⁵⁶⁹ Similarly, the same strictness and seriousness applies to theft and armed robbery (*ḥirāba*) offences. According to al-Hageel, these offences potentially “endanger people’s positions, their honor, and their lives” and as a consequence of these offences, people’s “lives will become bitter and hardly worth living, since the thief is like a wild animal that may savage anyone it encounters.”⁵⁷⁰ *Hadd* punishments, on the other hand, provide a means by which to reaffirm the moral boundaries of society. This leads Ogechi to conclude that *ḥadd* punishments must be implemented when “the operating legal norm in a society is violated”. In his view, the law of *ḥadd*

tests the resolve of the society to promote social solidarity through the affirmation of its values. Punishment provides a society with a definition of what crime is; how it will be punished; how much punishment is appropriate; and what emotions can be expressed through punishment; who is permitted to punish; and where the authority to punish lies.⁵⁷¹

5.3.2 Contra-*ḥadd* arguments

⁵⁶⁹ Al-Qaraḍāwī, *The Lawful and the Prohibited in Islam*, pp. 133-134.

⁵⁷⁰ Al-Hageel, *Human Rights in Islam and Their Applications*, p. 166.

⁵⁷¹ Ogechi, “Crime and Justice in Postcolonial Nigeria”, p.320.

Arguments against the applicability of *ḥadd* punishments in today's society are usually voiced by traditionalists and especially, by modernist Muslim thinkers, even if it is not always easy to make a neat distinction between these two groups and the Salafis and conservatives. Traditionalists such as Abou El Fadl, for example, may offer ideas and arguments which conservatives can use to underscore the value of the *fiqh* tradition and therefore, the relevance of the *fiqh* doctrines about *ḥadd*. On the other hand, a modernist like Muhammad Shahrour, while suggesting extreme reforms to the law of *ḥadd*, is in other instances not entirely opposed to implementing, for example, the punishment of flogging for *zinā*, as I will show in due course. In the following section, I focus on two arguments of the anti-*ḥadd* faction: that to implement *ḥadd* punishments today would be an anachronism, and that *ḥadd* provisions in the Qur'ān and Sunnah can and indeed must be interpreted in such a way that makes *ḥadd* punishments virtually irrelevant for the here and now.

5.3.2.1 *Ḥadd* and the question of historical change: debates about the (in-)applicability of *ḥadd* in the modern age

When discussing *ḥadd*, modernist scholars tend to focus on the question of historical change and the inapplicability of *ḥadd* punishments in the changed world of today. They agree upon the fact that the fundamental principles of Islam – such as justice, mercy, and equality before the law – are immutable, absolute, and eternal. However, their implementations in time or

in history are relative, changing, and in constant mutation.⁵⁷² Therefore, the modernists have suggested that nowadays Muslims must try to remain faithful to those principles and strive to implement them as best they can, but that they must do so according to the requirements of their own time. Modernists have completely rejected the mere imitation, reproduction, or duplication of the historical models that were developed in a particular historical context but can hardly claim to be relevant today.⁵⁷³

The Islamic tradition, including the reports about the actions and opinions of the Prophet's Companions (*ṣaḥāba*), entails narrations about the implementation of *ḥadd* punishments which can be shown to be relevant and in accordance with a specific time and context – namely, that of early Islam. For instance, stories about the second caliph ‘Umar ibn al-Khaṭṭāb, who is often remembered for his stern sense of justice, are thus interpreted to demonstrate that the law of *ḥadd* is subject to change according to the circumstances of the crime within its particular social and historical context. It is not always easy to distinguish between the eternal and the non-eternal sides of revelation, and according to the modernists, this difficulty has led to many of Islam's contemporary dilemmas. As Tariq Ramadan puts it, “by failing to distinguish sufficiently between the immutable and the changing – and never doing so systematically – contemporary literalists bestir a series of other confusions involving especially grave consequences.”⁵⁷⁴

⁵⁷² Ramadan, *Radical Reform*, p. 19.

⁵⁷³ Ibid., p. 19.

⁵⁷⁴ Ibid., p. 19.

Consequently, Muslim modernists agree with the other camps that Qurʾānic injunctions, prohibitions, and recommendations carry absolute and immutable aspects; but importantly, they disagree with the other camps in the sense that they believe that the concrete implementation of fundamental Islamic norms necessarily takes different and changing forms according to the changing and evolving environment⁵⁷⁵ With regard to *ḥadd* punishments, modernists have usually rejected them as inapplicable for modern Muslim societies. According to the modernists, this inapplicability of the law of *ḥadd* is due to two main reasons: its “ideal” character and the anachronism of *fiqh* doctrines in the world of today.

Modernists see Islamic criminal law as an ideal law which never translates in any straightforward and ‘literal’ way into social practice. This ideal law, they suggest, could only be implemented to the letter in an ideal society – but this ideal society does not exist currently. Hence all application of the law today must realize its own contingency and contextual nature, and therefore allow for diversity of interpretation and for reform. (The “ideal law”, meanwhile, needs neither reformation nor clarification.) As El-Awa writes,

It must be remembered that Islamic law is an ideal legal system i.e., it is not a law of custom which grew up within the society in which it was applied; rather it is a legal system which was formulated in order to realize an ideal society, the Islamic society. This idealism is clear enough from the

⁵⁷⁵ Ibid., p. 18.

Qurʾānic injunctions and prohibitions concerned with the social life of Muslims.⁵⁷⁶

El-Awa indicates that if the ideal society does not exist, then Islamic law in its ‘pure’ form cannot be applied.⁵⁷⁷ Hence, any implementations of Islamic criminal law in the present day will not make any sense or be of any use.⁵⁷⁸ Consequently, voices have emerged that advocate that at the present time the application of *ḥadd* penalties is not required.⁵⁷⁹

The modernists are inclined to concentrate more on exploring the gap between the ideal law defended by the other camps and the reality of the current practices of that ideal law. This gap, as Kamali suggests, has grown so wide as to make attention to the particularities of legal practice relatively insignificant at a time when Shari‘ah as a whole is being challenged as being irrelevant to the concerns of modern society.⁵⁸⁰ Thus, the current enforcements of *ḥadd* punishments in contemporary society have been viewed as totally wrong, and so, such enforcement is expected not to achieve the aims required by the Lawgiver.

Secondly, the *fiqh* doctrines of *ḥadd* as they were developed in the medieval jurists’ manuals are seen not to fit in the present time, and their imposition in today’s Muslim society is condemned as an anachronism.

⁵⁷⁶ El-Awa, *Punishment in Islamic Law*, p. 137.

⁵⁷⁷ Ibid., p. 138.

⁵⁷⁸ Ibid., p. 135.

⁵⁷⁹ Hussain, *Islamic Law and Society*, p. 140.

⁵⁸⁰ Kamali, “Punishment in Islamic Law”, p. 233.

Modernists by and large think that current attempts for justifying *ḥadd* punishments signify an outright lack of understanding God's aims and purposes in revealing His law.⁵⁸¹

The Swiss-Egyptian modernist Tariq Ramadan plays an important role in this debate. In March 2005 Ramadan launched a call for a moratorium on corporal punishment and stoning in the Muslim world. Ramadan urges Muslim scholars to debate the applicability of Islamic criminal law as carried out in modern times. As he writes,

while this debate must be started and carried out, it is necessary to take measures guaranteeing justice and respect for the dignity of humankind, particularly to the poor and of women in Muslim majority societies, for they are the first victims of the literal and often hasty implementation of the texts.⁵⁸²

While the moratorium is in place, Ramadan wants contemporary Muslim jurists and scholars to re-consider a number of fundamental issues and asks particularly the following questions: What do the texts really say? What are the conditions required for the implementation of *ḥadd* punishments? And in what social context?⁵⁸³

Unlike Muhammad Shahrour, another important figure in the contemporary debate about *ḥadd*,⁵⁸⁴ Ramadan is not totally opposed to the

⁵⁸¹ El-Awa, *Punishment in Islamic Law*, p. 136.

⁵⁸² Ramadan, *Radical Reform*, p. 275.

⁵⁸³ *Ibid.*, p. 275.

⁵⁸⁴ Cf. the following section.

idea that contemporary Muslims can learn from their legal tradition. As he writes,

one must immerse oneself in the Islamic Universe of reference and assess its sources, instruments, and (interpretative, legal, or ethical) methodologies, and on the other, take into the account the history of their concrete implementation, going so far as to measure their relevance and efficacy in terms of the challenges of our time.⁵⁸⁵

Ramadan argues that to reject the whole tradition of Muslim jurisprudence will not help present-day Muslims to reconcile themselves to their rich past, which as he describes it is the best way of devising new paths toward the future.⁵⁸⁶ Ramadan rejects Shahrour's neglect of *fiqh*, which he considers a fundamental source of law. Not only would this be disrespectful but also, as Ramadan enunciates, "a sort of guilty madness, cutting off Muslims from their heritage under the pretext of having them 'move forward' toward the 'modern'... in the name of an illusory progress removed from its roots."⁵⁸⁷

Ramadan's call for a moratorium on *ḥadd* punishments has been criticised by both the proponents of *ḥadd* laws and their opponents. For many in the West, the moratorium was insufficient. Westerners requested that *ḥadd* be denounced outright. Muslim scholars in the East viewed this call as an excessive compromise in that it was in contradiction to Islam's core

⁵⁸⁵ Ramadan, *Radical Reform*, p. 315.

⁵⁸⁶ Ibid., p. 27.

⁵⁸⁷ Ibid., p. 27.

principles. Further, the call was regarded as an attack against Shari‘ah produced by an “over-Westernised” mind “trying to please the West”.⁵⁸⁸

Ramadan defended his call for a moratorium stating that:

In the name of the higher objectives of the message that call for respect for the life and dignity of women and men, equality and justice, it was urgent to put an end to an instrumentalization of religion through literalist, formalist implementations that continued to affect poor people, women, political opponents who have never had the means to defend themselves and who are punished for example’s sake and without justice.⁵⁸⁹

5.3.2.2 *Ḥadd* punishments and the limits of interpretation in contemporary Islamic legal thought

In the contemporary debate about *ḥadd*, Muhammad Shahrour is perhaps the most unconventional and creative voice to have emerged in recent years. Shahrour proposes a general “theory of limits” (*ḥudūd*) to resolve the many problems that arise when Shari‘ah meet modernity. This theory, according to Shahrour, proposes that there is always an upper and lower limit in each Qurʾānic legislation about *ḥadd* punishments. Shahrour’s main thrust revolves around this argument, which implies that the entire body of Shari‘ah must always be subject to fresh examination in light of the

⁵⁸⁸ For more about the reactions to Ramadan’s initiative see Ramadan’s *Radical Reform: Islamic Ethics and Liberation*, pp. 274-5.

⁵⁸⁹ Ramadan, *Radical Reform*, p. 276.

Qurʾānic evidence. This can only be successfully achieved by a systematic and bold interpretation of the Qurʾān.⁵⁹⁰

Already Tariq Ramadan suggests that the “transhistorical” element in the Qurʾānic and Sunnah legislation can only be apprehended if the changing contextual modalities and conditions of application of these transhistorical prescriptions are taken into account.⁵⁹¹ But in Shahrour’s account, the demarcation between the divine and the non-divine aspects of the Qurʾān is even more explicit. Shahrour seems particularly indebted to the thought of Fazlur Rahman in this respect, and it may therefore be worthwhile reminding ourselves of the legacy left by this giant of modernist thought in Islam.

F. Rahman developed his highly complex and important Islamic methodology for reform between the 1960s and 1980s. Rahman severely criticised the traditional methodologies applied to the Islamic tradition by the classical jurists. For example, he entirely rejected the inherited approach of interpreting the Qurʾān verse by verse. He proposed that the Qurʾān be interpreted as a whole, held together by an underlying spirit that defines the Qurʾān’s “nature”. This spirit and nature can only be grasped if one considers the Qurʾān in its own setting, that is, with reference to its historical context on the one hand and the personality of the Prophet on the other. Rahman urged Muslim scholars not to fail to understand the nature of the Qurʾān and the Prophet’s role in interpreting the Qurʾān. He argued that

⁵⁹⁰ Rahman, “Islamic Modernism: Its Scope, Method and Alternatives”, p. 329.

⁵⁹¹ Ramadan, *Radical Reform*, p. 18.

[f]or the failure to understand the Qurʾān as a deeper unity yielding a definite weltanschauung, the greatest penalty was paid in the realm of theological thought. Whereas in the field of law, in the relative absence of such an internally discovered unity, the incorporation of foreign materials introduced a sufficient degree of practicality, the same process of adopting foreign ideas in the field of theology – again in the absence of such a unitary vision of the Qurʾānic weltanschauung – proved disastrous, at least in the case of Ashʿarism, the dominant Sunnī theology throughout medieval Islam.⁵⁹²

Contrary to what this quote may suggest, Rahman saw Islamic law likewise stricken by an inability to differentiate between the universal spirit of Islamic revelation and its historical particulars. One of the main thrusts of Fazlur Rahman is that there is constant historical change on various levels of society and that, in order to meet the evolving changes successfully, the law must be mutable:

When new forces of massive magnitude – socio-economic, cultural-moral or political – occur in or to a society, the fate of that society naturally depends on how far it is able to meet the new challenges creatively. If it can avoid the two extremes of panicking and recoiling upon itself and seeking delusive shelters in the past on the one hand, and sacrificing or compromising its very ideals on the other, and can react to the new forces with self-confidence by necessary assimilation, absorption, rejection and other forms of positive creativity, it will develop a new dimension for its inner aspirations, a new meaning and scope for its ideals.⁵⁹³

⁵⁹² Fazlur Rahman, *Islamic Methodology in History*. (Karachi: Central Institute of Islamic Research, 1965), p. 3.

⁵⁹³ Rahman diagnoses the problem by arguing that “[the] Muslim society has plunged itself into the Industrial Age- if it did not do so, its fate would be sealed. But these vast and massive impacts require a creative response of *equal dimensions* if our society is to progress

Rahman argued that the early Islamic historical tradition proves that the Qurʾān and the Prophetic tradition *Sunnah* were creatively elaborated and interpreted to meet the new factors and impacts upon Muslim society and thus to turn the guidelines of revelation into a “living Sunnah” of the Islamic community.⁵⁹⁴ A similar move has to occur in each age anew. For Rahman, the fatal mistake is “to insist on a literal implementation of the rules of the Qurʾān, shutting one’s eyes to the social change that has occurred and that is so palpably occurring before our eyes”, which is “tantamount to deliberately defeating its moral-social purposes and objectives.”⁵⁹⁵ Fazlur Rahman held that Muslims, and particularly modernist Muslims, have often contended that the Qurʾān gives us “the principles”, while the *Sunnah* or our reasoning of the Qurʾānic rulings turns these fundamentals into concrete solutions. However, Rahman sees this dialectic of “broad principles” vs “concrete actualization” in a much more nuanced way:

This is considerably less than a half-truth and is dangerously misleading. If we look at the Qurʾān, it does not in fact give many general principles: for the most part it gives solutions to and rulings upon specific and concrete historical issues: but, the rational behind these solutions and

Islamically. This calls for a relentless process of hard, clear, systematic and synthetic thinking, which is not yet visible in the Muslim world. By and large, and in effect, we are still suffering from intellectual indolence and consequently, for all practical purposes, are experiencing the two extreme attitudes born of this indolence.” Cf. Rahman, *Islamic Methodology in History*, pp. 176-177.

⁵⁹⁴ Rahman, *Islamic Methodology in History*, p. 177.

⁵⁹⁵ Rahman, *Islam and Modernity*, p. 19.

rulings, from which one can deduce general principles. In fact, this is the only sure way to obtain the real truth about the Qurʾānic teaching.⁵⁹⁶

This brings us back to the kind of scriptural hermeneutics advocated by Muhammad Shahrour. For Shahrour, we are faced, on the one hand, with revealed norms concerning matters of worship – these are immutable and absolute (*thābit*). On the other hand, there are transhistorical ideas and norms in revelation which are subject to change (*mutaghayyir*) and defined by the temporal evolution and environmental changes.

While *ḥadd* offences are defined in relation to the divine and so are not permitted under any conditions, the punishments that are associated with them are not as clearly defined. They are the product of the tradition and are therefore subject to alteration, modification and reformation under changing conditions and contexts – in a word, they are the objects of *ijtihād*. Shahrour calls loudly for the doors of *ijtihād* to be re-opened; in fact he sees this as a necessity in order to meet the challenges and the changes of modern culture and society. Islamic legislation has to be based on the principles of *ijtihād*, which, according to Shahrour, will enable a controlled renewal, and flexible adaptation of legal rules to changing historical circumstances.”⁵⁹⁷

⁵⁹⁶ Rahman argues “In building any genuine and viable Islamic set of laws and institutions, there has to be a twofold movement: First one must move from the concrete case treatments of the Qurʾān- taking the necessary and relevant social conditions of that time into account- to the general principles upon which the entire teaching converges. Second, from this general level there must be a movement back to specific legislation, taking into account the necessary and relevant social conditions now obtaining.” Rahman, *Islam and Modernity*, p. 20.

⁵⁹⁷ Ibid., p. 177.

In reference to *ḥadd* verses, the modernists have viewed these verses less as concrete instructions than as a framework within which the judicial authorities may adapt norms as required by social change.⁵⁹⁸ Accordingly, the scope of legislation, as Shahrour argues, is to allow humans to move between the upper and lower limits set by God in the Qurʾān.⁵⁹⁹ According to Shahrour, the Prophet gave a highly advanced example of legislation that stood in sharp contrast to the existing abysmal economic situation and primitive tribalism of Arabian society.⁶⁰⁰ This observation leads Shahrour to conclude that today's scholars are in a much better position to understand the legislative verses of the divine message because of the advances that human and natural sciences have achieved.⁶⁰¹ He argues that "it is up to the *mujtahids* to decide, in the concrete historical context, which penalty is the most appropriate for each crime."⁶⁰²

With regard to the limits of interpreting *ḥadd* verses, both Rahman and Shahrour present different interpretations, for instance, concerning the verse that stipulates the punishment for theft: "As to the thief, male or female, cut off his or her hands: a punishment by way of example, from God, for their crime-God is exalted in power. But if the thief repents after his crime, and amends his conduct, God turns to him in forgiveness; for God is oft-forgiving, most merciful" (Qurʾān 5:38-9). Rahman's assumption is that

⁵⁹⁸ Ibid., p. 191.

⁵⁹⁹ Ibid., p. 179.

⁶⁰⁰ Ibid.

⁶⁰¹ Ibid.

⁶⁰² Ibid., p. 201.

the concept of theft has two main elements. The first one is the unlawful taking of a valuable entity and the violation made against the right of a private possession. This is in contrast to the Arabian tribe system of tribal customs where the right of possession is strongly associated with an accentuated sense of personal honour and theft is primarily regarded, not as an economic crime, but as a crime against values of personal honour and its inviolable sanctity. However, Rahman notes that in advanced urbanised societies there is a visible shift in values. Theft is considered as wrongful primarily in *economic* terms, as the thief deprives the owner the right to use a certain economic asset or facility. Importantly, this shift in contemporary values of the society requires a radical change in the forms of the *ḥadd* punishment.⁶⁰³ Rahman contextualises the theft verse in its Arabian context, and this leads him to consider the crime from a different perspective when it comes to the contemporary context.

While Shahrour shares Rahman's concern to find a new relevance for the theft verse in the Qur'ān, his method is at the same time more daring and more concrete. Shahrour examines the meaning of the text by applying a different approach and method of interpretation of the verse. He argues that the verb used for 'to cut off' is the Arabic term *q-ṭ-ʿ* which, as the dictionary of Ibn al-Fāris shows, has more meanings than the physical amputation of hands alone. The dictionary provides additional examples of the usage of the verb 'to cut off', including 'to cut a corner', 'to cut a long story short', 'to cut

⁶⁰³ Rahman, "Islamic Modernism: Its Scope, Method and Alternatives", p. 330.

off a relationship’, or ‘to cut down expenses’. The verb ‘to cut’ is used both literally and metaphorically; it does not always require a knife or a sword to cut something off.⁶⁰⁴

Moreover, Shahrour indicates that, where the Qurʾān stipulates the phrase ‘to cut off’, this is always used in the context of the active participle *sāriq*, which refers to a person who is actively engaged in criminal activities in contrast to a person who has repented of his crime. The punishment, in other words, only applies to *active* thieves who show no repentance. Such an interpretation is not found in the classical *fiqh* tradition and goes miles to show Shahrour’s ‘modernist’ methodology, according to which he is quite happy to bypass the *fiqh* tradition and look at the Qurʾān with a fresh eye. Shahrour argues that it is questionable to attribute any conclusive meaning to the ‘theft verse’ and that we should seriously reconsider our current understanding of theft and adopt a more flexible stance toward it. For Shahrour, a “well-organised prison”, for example, can provide the required punishment of ‘cutting off’ efficiently – in this case, the ‘cutting off’ of the criminal from society.⁶⁰⁵ Nonetheless, Shahrour does recognise the theft punishment is dictated in the Qurʾān. But he argues that the last recourse is the amputation of the hand, for this is the upper limit of the *ḥadd* for theft crimes. He states that

⁶⁰⁴ Shahrour, *The Qurʾān, Morality and Critical Reason*, pp. 197-198.

⁶⁰⁵ *Ibid.*, pp. 200-201.

[t]he amputation of the thief's hand must only be regarded as the last resort if other forms of punishment have proved ineffective or if the type of theft was very serious. If, for instance, only a slice of bread has been stolen and if this was not done out of sheer menace but because of desperate hunger, to cut off a person's hand – as if he had stolen somebody's possessions out of greed and pure self-indulgence – is a violation of the flexible and moderate character of Islamic law.⁶⁰⁶

Moreover, Shahrour points out that the evidence to impose a level of the flexibility of *ḥadd* verses is found in the Islamic tradition. Although he accepts that the Prophet Muḥammad had indeed ordered the amputation of the hands of thieves in Median, he also argues that we should not forget that the second caliph 'Umar b. al-Khaṭṭāb had ruled against the Prophet's example and pardoned a number of thieves.⁶⁰⁷

There are some limits to the “theory of limits”, however. In reference to the offence of adultery (*zinā*), the Qurʾān states that “the woman and the man guilty of adultery or fornication: flog each of them with a hundred stripes; let not compassion move you in their case, in a matter prescribed by God” (24:2). According to Shahrour, the punitive measures in the *zinā* verse are unambiguous. They exhibit absolute norms of how to punish the crime. Therefore, the *ḥadd* for *zinā* should neither be less nor more than one hundred stripes. As Shahrour underscores, the verse makes it also clear that no compassion shall ‘move you in their case’.⁶⁰⁸ Thus, the punishment for

⁶⁰⁶ Ibid., p. 189.

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid., pp. 206-207.

adultery and fornication is stated explicitly in the verse; when the offence is proven before the judge the punishment must result in one hundred lashes being inflicted on the person in a public setting. The public setting is intended to deter others from committing such indecent crimes. However, for *zinā* to be adjudicated, Shahrour argues that the offence has to take place in a public area where four witnesses could witness the offence without breaking any privacy. Notably, Shahrour does not recognise pregnancy as evidence of a *zinā* offence.

It is worth mentioning that M. Shahrour does not belong to the profession of Islamic legal and exegetical experts, has been nowhere near scholarly Islamic institutions, and has not achieved any formal training or certificates in the Islamic sciences.⁶⁰⁹ Shahrour's main thrust has been basically based on the distinction between the divine and the non-divine within the Qur'ānic revelation and the Prophetic tradition. This type of distinction allows him to treat the legal stipulations of the Qur'ān as ever changing and always evolving, but relevant and indeed applicable as long as they move between the limits dictated only in the Qur'ān and not beyond them.⁶¹⁰ Christmann describes Shahrour's method in these words:

The theoretical basis for this is what Shahrour sees as the crucial distinction which must be made between two different forms of any religious

⁶⁰⁹ Andreas Christmann, "The Form Is Permanent, but the Content Moves: The Qur'ānic Text and Its Interpretations in Mohamad Shahrour's *Al-Kitāb wa al-Qur'ān*", In *Die Welt des Islam*, New Series, vol. 43, Issue 2. (2003), p. 171.

⁶¹⁰ Hallaq, *A History of Islamic Legal Theories*, p. 253.

discourse: at one level there is the divine reality, immutable, eternal, and absolute; while at the other level there is the human understanding of that divine reality, about which there is nothing divine, and which is changeable, partial, and relative.⁶¹¹

Shahrour's thought revolves around the idea that *ḥadd* punishments belong only to God, and that we can only know what *ḥadd* is if it is explicitly dictated in the Qurʾān – which in most cases, with certain exceptions, it is not. As to the Prophetic tradition, Shahrour treats it as “a model of good legal practice in the theory of limits, not as the ultimate specification and bindings exemplification of Islamic law.” He suggests that Muslims regard the Sunnah as an exemplary method of how to cope with the challenge and legal conflicts that Muḥammad faced in his time, and of how to emulate his methods and apply them with our methodology to a system of law by which we are able to face the challenges of our modern times.⁶¹² As to classical *fiqh*, Shahrour completely rejects it. Particularly, he refutes *qiyās* and views it as oppressive. As he asks, “how could an analogy be drawn between the seventh and the twentieth centuries?”⁶¹³ Shahrour claims that “we no longer need the help of our honourable scholars who would only continue their search for the umpteenth justification for amputation.”⁶¹⁴ Instead, he calls for opening the door to *ijtihād*, even on explicit verses, arguing that “the theory of limits puts

⁶¹¹ Christmann, “The Form Is Permanent, but the Content Moves”, pp. 149, 150.

⁶¹² Shahrour, *The Qurʾān, Morality and Critical Reason*, p. 215.

⁶¹³ Hallaq, *A History of Islamic Legal Theories*, p. 253.

⁶¹⁴ Shahrour, *The Qurʾān, Morality and Critical Reason*, p. 190.

the priorities right and allows *ijtihād* for all legal verses, whether explicit text [naṣṣ] or not.”⁶¹⁵

⁶¹⁵ Ibid., p. 217.

5.4 Conclusion

In conclusion, in this chapter I have attempted to provide an overview of the debate about the applicability of the Islamic criminal law of *ḥadd* in contemporary Muslim society. Through the course of this examination, four key arguments have emerged, from which I would like to draw three main conclusions.

First, contemporary proponents of the re-implementation of Shari‘ah law focus their attention on criminal justice and particularly, the law of *ḥadd*. This area is a key bone of contention; for the pro-*ḥadd* faction, it is in fact *the* main area of law in which Shari‘ah should be re-activated and imposed by governments in Muslim societies.⁶¹⁶ Therefore, *ḥadd* punishments assume a central place in the controversy surrounding the calls for the application of Shari‘ah under the conditions of modernity.⁶¹⁷ Salafis and conservatives hold the view that Muslims have a choice and indeed a duty to implement *ḥadd* punishments; it is the best penal law that will work for them. Thus, attempting to use any type of Western notions of human rights to evaluate the law of *ḥadd* is seen as unavoidably problematic.⁶¹⁸ For the Salafis and

⁶¹⁶ Sidahmed, “Problems in Contemporary Applications of Islamic Criminal Law Sanctions”, pp. 187-204.

⁶¹⁷ Ibid., p188.

⁶¹⁸ Ogechi, “Crime and Justice in Postcolonial Nigeria”, p. 340.

conservatives, there is no evidence to support the conclusion that the law of God can be overruled and challenged by man.⁶¹⁹

Secondly, in the contemporary debate of Muslim scholars about the justifications of *ḥadd* punishments, there is serious disagreement about whether *ḥadd* punishments should be implemented or not. This is because modern scholars differ in the methods and approaches applied to the Islamic tradition (Qurʾān, sunnah, *ijmāʿ* and *qiyās/ijtihād*). The modernists' claim is that the Salafis and conservatives fail to distinguish between revelation which is immutable and absolute, and the transhistorical dimension of revelation which is subject to change, according to the evolution of Muslim society over time. The modernists see that main failure of the Salafis and conservatives in that they do not distinguish between the divine and the non-divine aspects of revelation.

Accordingly, the modernists' debate revolves around the fact that there is a set of Islamic principles that are absolute and therefore required to be implemented regardless of time or place.⁶²⁰ However, these 'absolute' principles are few: the five pillars of Islam in addition to basic Islamic obligations and prohibitions, especially in the area of Islamic ritual law (*ʿibādāt*). However, in the context of social affairs (*muʿāmalāt*) laws are generally viewed as flexible and changeable, unless there is an explicit scriptural text. Thus, the *muʿāmalāt* are more open to rational reasoning, creativity and undertaking of further research. In sum, the modernists are

⁶¹⁹ Ibid., p. 327.

⁶²⁰ Ramadan, *Radical Reform*, p. 18.

more inclined to apply their own reasoning to Islamic penal law (*ḥadd*), and so are not all prepared to accept a penal system which is completely based on the perspective of classical *fiqh*.⁶²¹

Contemporary Muslim modernists are aware of the challenges facing their approach. They are the only camp to have put their finger on the problem of the contemporary application of Shari‘ah law. As Fazlur Rahman suggested, a modernist reading of the Islamic sources raises many questions about, for example, the eternity of the Word of God or indeed the absolute character of the Divine Law.⁶²² Modernists such as Rahman, Ramadan and Shahrour all propose a method of interpretation of the Qur‘ān and the Sunna that aims to provide an honest, true and practical view of Islamic revelation. However, there seems to be no reason to believe that Muslim Salafis and conservatives are ready to accept this approach.⁶²³ Secondly, the modernists’ approach is accused of being “too total and abrupt” and of “sacrificing too much of the traditional, that is ‘historic’, Islam at a single stroke”; it is also suspected to carry within itself a ‘Western’ agenda of undermining Islam.⁶²⁴ All these accusations naturally make the modernist project all the more difficult.

The third conclusion is in reference to *ḥadd* punishments and the definitions and limits of these punishments as they are outlined in the

⁶²¹ Majid Khadduri, *The Islamic Concept of Justice* (USA: The Johns Hopkins University Press, p. 1984.), p. 216.

⁶²² Rahman, “Islamic Modernism”, pp. 330-1.

⁶²³ *Ibid.*, p. 331.

⁶²⁴ *Ibid.*

Qurʾān. Modernists agree with the classical view that Muslim judicial authorities must avoid indiscriminate enforcement of *ḥadd* punishments and instead consider mitigation as absolutely vital. They go farther, however, when arguing that the limits set in the Qurʾān must be guarded and not exceeded in any way. Shahrour's reference to the theory of limits enables the legislator to evaluate the extent to which the culprit has exceeded the limits dictated in the Qurʾān, and therefore, the judge will be able to identify the form of punishment which is to be inflicted. For instance, the verse describing the theft punishment indicates the upper limit of the punishments as the cutting off of the hand. In particular Shahrour's "theory of limits" appears to offer the modernist position a new and promising way of reconciling Shariʿah with the demands of our modern age.

Finally, it is evident that Salafis, conservatives and traditionalists treat the historical models as their primary reference because its authors, presumably the Prophet and his Companions, were able to achieve coherence between ideals and practice.⁶²⁵ Contrary to this, the modernists have emphasised a most vital point, that is, the importance of rejecting imitation of these historical precedents, and instead of reproducing the ethical demands and human efforts through which the past ideal was achieved. Not to repeat early Islam's form but to grasp its substance, spirit, and objectives: *that* is the call of the modernists.⁶²⁶

⁶²⁵ Ramadan, *Radical Reform*, p. 20.

⁶²⁶ *Ibid.*, p. 20.

It is reasonable and convincing to argue that the laws as ordained in the Islamic tradition are meant to preserve the limits set by God. If God's limits were set to protect the general welfare of the Muslims then, the focus has to be on the general welfare rather than on the literal interpretations of *ḥadd* verses. In other words, God's intentions and aims behind the *ḥadd* punishments can only be achieved and fulfilled by maintaining the public welfare of the Muslims. Hence, the laws of *ḥadd*, as Gleave argues, hold "no intrinsic value, and if, on occasions, the strict application of the law compromises the aims of Shari'ah then for some supporters of the doctrine of *maqāṣid*, the law can be set aside or modified so that God's intentions might be fulfilled."⁶²⁷

Accordingly, the Salafi' and conservatives' calls for the re-implementation of *ḥadd* laws for the sake of preserving the integrity of their cultural and religious practices cannot be considered justified. The severity of *ḥadd* punishments as they are understood in the dominant classical tradition, in the contemporary situation, is open to a moratorium, as proposed by Ramadan, and potentially, to a fundamental reconsideration. Salafis and conservatives take a defensive but all too easy position when stressing the superiority of Islamic law over man-made law. Modernist proposals such as Shahrour's "theory of limits" are, on the whole, more convincing and appealing when one considers current debates about the applicability of *ḥadd* punishments.

⁶²⁷ R. M. Gleave, "Maqāṣid al-Shari'ah (a)", p. 569.

6. Conclusion

In the course of my analysis, the term *ḥadd* has proven to be rich in significations and semantic nuances. On the one hand, the term *ḥadd* indicates that certain punishments are defined (i.e. by God) in a clear and unambiguous way. The second form of the Arabic root *ḥ-d-d* bears witness to this, since its *maṣḍar*, or verbal noun *taḥdīd* means “definition, determination”. Related to this aspect is the idea that the *ḥadd* punishments are “divinely decreed” and therefore immutable and non-negotiable. On the other hand, one can argue that the *ḥadd* punishments carry their name because they are meant to deter people from engaging in certain immoral behaviours specified in revelation. Their aim is to obstruct someone’s path, literally to erect a ‘boundary’ (*ḥadd*) in front of a person, in the way of a border that cannot be exceeded or transgressed; however, *within* this boundary a certain space for interpretation and reasoning remains. In the contemporary context, Muḥammad Shahrour has pushed this line of reasoning to an extreme, by arguing that *ḥadd* punishments in the traditional understanding only demarcate the absolute extreme of what is allowable as punishment in Islamic criminal law, but that the actual social and cultural context of contemporary Muslim society demands far less severe punishments.

In the foregoing chapters I have attempted to critically evaluate a number of strategies for the justifications of *ḥadd* punishments as they are

found throughout the Islamic tradition of jurisprudence (*fiqh*) and in modern and contemporary Muslim legal discourse. In chapters one to three, I have introduced into the *fiqh* discourse on *ḥadd* an element of systematization that is not necessarily found in the *fiqh* tradition itself, which discusses the various perceived purposes and justifications of *ḥadd* punishment interchangeably and in varying contexts.

Throughout this research, four justifications have been extracted from within the Islamic jurisprudence (*fiqh*), and then presented and analysed in a systematic order. By analysing the juristic provisions of the Islamic criminal law of *ḥadd*, we have gained insights into Islamic values, or at least into values held dear by the classical jurists who formulated and justified *ḥadd* laws. In chapter one, I have paid particular attention to the legal argument that the *ḥadd* punishments are to be considered “divinely ordained”, fixed and immutable “rights of God” (*ḥuqūq Allāh*). I have argued, first of all, that there is no Qurʾānic or Prophetic explicit indication that *ḥadd* is a right belonging exclusively to God; instead I have suggested that the justification of *ḥadd* punishments as the right of God is a concept developed by the jurists, as is the concept of *ḥaqq al-ʿabd*, or “right of man”. I argued that *ḥadd* punishments were considered as *ḥuqūq* Allah as opposed to other crimes, that is retaliation *qiṣās*, because jurists tended to follow a strict interpretation of the Qurʾānic verses of *ḥudūd* where the punishments are ordained explicitly. This is led the jurists to regard the norms of *ḥudūd* as *muqaddarāt* in which the reason for its legislation is known only to God.

Secondly, I have shown that, despite the fact that the *ḥadd* laws were regarded as norms decreed by God (*muqaddarāt*), that is fixed and immutable, classical Muslim jurists were not unwilling to speculate about the *ratio legis* of *ḥadd* punishments. Particularly the Ḥanafis circumvented the rigidity that seems implied in the concept of *muqaddar* norms by equating the concept of the “interest of God” with the idea of the common good or public well-being (*al-maṣlahā al-‘āmma*). In fact a majority of Sunnī argued that these rights aim to rid the world of evil and that this, in essence, is the purpose of the divine legislation on *ḥadd*. Jurists justified *ḥadd* as the right of God for a number of factors related to the ways in which early Muslim jurists set the rules for the implementation of *ḥadd* punishments. By discussing the line demarcating the right of God from the individual’s right Sunnī jurists created a legal discourse that allowed them to make sure that the rule of Shari’ah law was upheld and safeguarded, and that both society’s needs (symbolized by the notion of “the common good”) and private interests such as honour and the right for retaliation were in proper balance.

It is true, the Sunnī jurists insisted on the absolute necessity of implementing *ḥadd* punishment whenever the crime is notified to the Muslim judge. But they also outlined many exceptions and caveats in order to avoid the implementation of *ḥadd* punishments in specific conditions defined in their legal textbooks. One of the main characteristics of the definition of *ḥadd* as the right of God is that the jurists’ debate about God’s right versus the individual’s right is based on, and reflects, background values concerning basic qualities of the Muslim individual and the good Islamic society that

Muslims must uphold. The Ḥanafīs, for example, held that *ḥadd* punishments are the rights of God to safeguard the common good, and that when they are in conflict with an individual's right, they tend to outweigh the latter. The Shāfi'īs and the Ḥanbalīs tended to give individual rights greater weight in cases of conflict with a right belonging to God. The Mālīkīs, finally, held a middle position, seeking to preserve both the individual right and the right of God. For example, the Mālīkīs held that all rights must be preserved generally speaking, but multiple punishments are not acceptable, for example, one must avoid inflicting the *ḥadd* punishment once *qīṣāṣ* has been implemented.

In Chapter two I have examined how jurists justified the severity of *ḥadd* punishments by arguing that they deter the general public and the individual from committing forbidden offences. In the course of this chapter, I have proposed that Sunnī jurists generally and unquestioningly assumed that punishments like scourging and amputation deter culprits from (re-) committing *ḥadd* offences, and that therefore, the function, purpose and justification of *ḥadd* punishment is deterrence.

At the same time, as I have suggested in line with modern theories of punishment, the jurists' presumption that *ḥadd* punishments deter the culprit is not always accurate. I have proposed that, remarkably, the jurists *themselves* had an awareness of this. How else can one explain the fact that the jurists were involved in an endless dispute about issues such as the repetition of *ḥadd* offences and the overlap of various *ḥadd* offences? It is obvious, especially in the Shāfi'ī and Mālīkī doctrine, that the jurists had an

inkling of the inability of *ḥadd* punishments to achieve deterrence. It must be granted, however, that this inkling is never systematically pursued in classical *fiqh* or turned into a fully developed argument. It is indeed striking that Sunnī jurists never question whether *ḥadd* punishments are ‘just’ or ‘unjust’. In their view, *ḥadd* punishments can only be ‘unjust’ with regard to the formalities of their implementations, that is, when there is a failure in *ḥadd* procedure. Presumably, jurists viewed *ḥadd* law as a just law because God is just; therefore His law of punishment must be just.

As for Sunnī legal reasoning in criminal law, I have suggested that there was a certain inconsistency in the Shāfi‘īs’ and Mālikīs’ approach to *ḥadd* punishments and in the way they thought about possible justifications for *ḥadd* punishments. This is clearly manifest in their disputes about the repetition of *ḥadd* offences, particularly in reference to the repetition of the theft offence. Sunnī jurists’ assumption that *ḥadd* punishments are immutable and fixed led them to think of the particulars of the punishment and the way in which it should be implemented rather than about the concrete “wisdom” (*ḥikma*), or the purpose, behind the legislation of *ḥadd* punishments and whether or not the punishments in every single case were always effective as a deterrent. Despite the assumption of the jurists that the *ḥudūd Allāh* are ordinances decreed by God, that is fixed and immutable, Sunnī jurists’ writings are replete with examples where *ḥadd* law is dealt with in a rather mutable and flexible way, even to the point of making *ḥadd* norms completely inoperative. For example, the jurists replaced the punishment of banishment with that of imprisonment, and some jurists, like the Ḥanafīs,

replaced the punishment for apostasy for female apostates with imprisonment.

In chapter three I have examined the justification of the *ḥadd* punishment as serving to expiate the culprit from punishment in the hereafter (*kaffāra*). I have argued throughout this chapter that the point of contention among Sunnī jurists was how to determine the nature of the “things decreed by God” – the *kaffarāt*, like the *ḥudūd*, are usually counted among the *muqaddarāt* – and whether humans have the capacity to apprehend them, that is, to reason about their logical structure. The justification of *ḥadd* as an act of *kaffāra* was sharply debated among the Sunnī jurists. The Ḥanafī school of law rejected the idea that the *ḥadd* punishment expiates the culprit from eschatological punishment; instead, the Ḥanafīs held that repentance was the only means to expiate sins. They consistently argued (cf. chapter one) that the divinely ordained punishments serve the greater good of humankind. They also claimed that the divinely ordained punishments are meant as a retribution for sins, but that only God knows the precise gravity of *ḥadd* sins, and that therefore it is impossible to predict whether *ḥadd* punishments would be ‘enough’ to atone for sins.

The Shāfi‘īs, Mālikīs, and Ḥanbalīs, on the contrary, consistently held *ḥadd* to be *kaffāra*. In this sense, they justified severe *ḥadd* punishments as *kaffarāt*. This happened alongside other justifications of *ḥadd* they proffered, namely, that *ḥadd* fulfils its purpose by being a right of God, and that it prevents (further) *ḥadd* offences. The Ḥanafīs were more restrictive in their justifications of *ḥadd*, limiting their discourse to the concepts of “God’s right”

and to general and individual prevention, but excluding expiation. *Hadd* as *kaffāra* was not one of the Ḥanafis' justifications for the severity of the *ḥadd* punishment. What this difference of opinion between the Ḥanafis and the other schools shows is that the balance between repentance and *ḥadd* punishment was always a difficult thing to achieve, and that it remained a contentious issue.

I set out in chapter four by classifying contemporary Muslim scholars into four different camps, each camp being characterized by their methods and approaches applied to the Islamic tradition, that is, the primary sources of Islamic law (Qurʾān and Sunnah), and the secondary sources developed in *fiqh* (*ijmāʿ/taqlīd* and *qiyās/ijtihād*). In the course of the chapter, I argued that contemporary views on *ḥadd* punishments vary significantly. While the Salafis, conservatives and traditionalists hold that *ḥadd* punishments are the defined and immutable law of God that, though to different extents, must be implemented, the modernists object to this idea. They criticize the current implementation of *ḥadd* laws as wrong and as causing severe injustices. The traditionalists and the conservatives are the camps who follow the classical justifications of *ḥadd* punishment most closely. As for the Salafis, they share with them the justification of *ḥadd* as a right of God; they also accept, though with some reservation, that *ḥadd* punishments can expiate sins. But they are not willing to follow *fiqh* reasoning about the preventive function of *ḥadd*. This they reject as an illegitimate speculation about the 'clear' meaning of the revealed sources of Islamic law.

The modernists are the camp that most drastically objects to the classical doctrine of *ḥadd* and its relevance for contemporary times. The modernists' effort is focused on reforming the Islamic tradition, and on the ways in which Muslim scholars should espouse a more critical approach to their tradition. Their methodological emphasis has been on developing a new hermeneutics for the re-interpretation of the Qurʾān, in order to uncover its underlying, 'eternal' spirit that is realized in different ways, however, according to changing times and circumstances. This is clear in the modernists' various statements about the way in which contemporary Muslim scholars should refer to the tradition. The modernists argue that the only way to produce a genuine Islamic way of life, including in its legal aspects, is to enlighten the public conscience, including that of the educated classes, with Islamic values. This, in fact, underlines the necessity of working out an Islamic ethics systematically from the Qurʾān and making such works accessible to the general reader. There is no shortcut to this process for the production of Islamic law; rather, the modernists aim to rethink the entire tradition from the bottom up.

In Chapter five I argued that the debate about the implementation of Islamic criminal law today is about more than a mere reform of the law along the lines of technical jurisprudential argumentation. The motivations behind the current implementation of Islamic criminal law have been as much political as they have been cultural. The politicians and legislators who have (re-)introduced *ḥadd* law proclaim their commitment to one specific interpretation of Islamic criminal law and to the establishment of an Islamic

state based on that interpretation, which does not tolerate other interpretations. This has clearly resulted in the inability in harmonizing *ḥadd* laws with human rights, and thus, this poses the biggest challenge in any overhaul of the classical criminal law. Conservative regimes wish to convey the message that Shari‘ah, being God’s law, is superior to man-made law. Any objection to the practical enforcement of their specific interpretation of Shari‘ah will be countered with the argument that human rights conventions are man-made regulations, whereas the Shari‘ah is based directly on revelation. On the other hand, the modernists have viewed the Islamisation of criminal law in the traditional understanding as a fatal mistake that does not reflect the good that the Creator has aimed at in legislating criminal justice. In the contemporary *pro-ḥadd* camp, the need to preserve Islam’s cultural authenticity is a paramount argument; *ḥadd*, according to the *pro-ḥadd* party, is deeply enshrined, and indeed constitutive of, a ‘true’ Islamic ethics. Those thinkers who aim to rethink *ḥadd* critically in the light of contemporary global politics, by contrast, stress the need to account for the historical embeddedness of the human understanding of revelation and therefore, the importance of applying a sophisticated and up-to-date hermeneutics to the sources of the law in Islam.

In this research, the review of classical *fiqh* strategies for the justification of *ḥadd* punishments has made it possible to capture important differences between the classical positions; it has demonstrated that classical *fiqh* discussions about *ḥadd* were a contested and nuanced area of thought. In this analysis, it has been necessary to go beyond the categories that have

historically characterised the Islamic legal theory of criminal law, and to impose our own grid of systematization and interpretation. The differences between justifications of *ḥadd* are not captured simply by referencing the different schools of law. What has become evident throughout this research is that classical Muslim jurists were engaged in a rich debate about how to derive, and at times, create *ḥadd* rules in an authoritative and determinate fashion in accordance with their conceptions of the divine will and the purpose of the divine law. This critical interest of the *fuqahā'* in elucidating the underlying purpose, even of areas of the law which by consensus are considered particularly resistant to human reasoning (that is, the *muqaddarāt*), is noteworthy.

The answers given by Sunnī classical jurists cannot possibly satisfy the expectations of contemporary advocates of human rights and of a fair and balanced criminal law; this would be asking too much from them. As premodern thinkers they will never fully meet the demands of modernist thought. Nevertheless, the subtleness and flexibility of classical legal discourse may well serve as a reminder that Islamic law is not as inflexible and rigid as some Muslim as well as Western voices today claim.

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